93-686

No. 93-____

Supreme Court, U.S.
OCT 28 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS, on behalf of their minor son, JOHN WILLIAMS,

Petitioners,

—v.—

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Third Circuit correct in concluding that many of the major civil rights acts, including Title IX, and presumably Title VI and Section 504, have extinguished claims of discrimination under the equal protection clause?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed, all appear in the caption of this case.

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No. 93-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS, on behalf of their minor son, JOHN WILLIAMS,
Petitioners,

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Sarah Anne Williams and Wayne Williams, on behalf of their minor son John Williams, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third

Circuit entered in the above-entitled proceeding on July 6, 1993.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit was filed July 6, 1993. *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993). (1a). The order denying rehearing was filed July 30, 1993. (119a). The opinion and order of the United States District Court for the Eastern District of Pennsylvania was filed July 14, 1992. 799 F. Supp. 513 (E.D. Pa. 1992). (71a).

JURISDICTION

The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254.

Petitioners filed a motion for summary judgment in the district court on

July 1, 1991. The motion for summary judgment was granted by the district court on July 14, 1992. The School District of Bethlehem appealed to the Court of Appeals for the Third Circuit, which reversed the Order of the district court, and remanded the case for further factual findings, on July 6, 1993. Petitioners filed a timely Petition for Rehearing with the Suggestion of Rehearing en Banc, which was denied on July 30, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due pro-

> cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title IX of the Education Amendments of 1972 provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance....

20 U.S.C. § 1681 (1988).

STATEMENT OF THE CASE

This case involves a high school boy who wants to play on his school's only field hockey team, which is reserved for girls.[1] But if that were all this case

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1. The basis for jurisdiction in the District Court is 28 U.S.C. § 1331, as the case arises under the Constitution and laws of the United States.

involved, it would probably not merit this Court's attention. However, in denying John Williams the right to participate in field hockey at his school, the Third Circuit held that pursuant to this Court's decision in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)(the "*Sea Clammers* doctrine"), John Williams has no right to raise equal protection claims. (41a). According to the Third Circuit's ruling, simply by passing the limited protections of Title IX, Congress intended to extinguish the right of any individual -- boy or girl -- to sue to enforce the constitutional right to equal protection from sex discrimination in his or her public school.

In ruling that the right of equal protection has been precluded, the Circuit ignored this Court's subsequent

decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), which permitted equal protection claims to be enforced after the passage of Title IX, in a case which fit into an exception of Title IX. More importantly, the Circuit's decision greatly expanded the *Sea Clammers* doctrine to the point that it can now be argued that many of the major Civil Rights Acts, including at least Title VI and Section 504, have extinguished the rights of individuals to sue to enforce their constitutional rights in the areas covered by those acts. Indeed, under the logic of the Circuit's decision, Congress could pass any statute in a particular area, riddle it with exceptions, and extinguish the broader protections of the constitution.

In recent years, this Court has often granted certiorari to review the

principles governing the enforcement of important statutory and constitutional rights. *See, e.g., Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987); *Maine v. Thiboutot*, 448 U.S. 1 (1980). This Court has also granted certiorari on several occasions to consider the right of individuals to enforce Title IX. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Grove City College v. Bell*, 465 U.S. 555 (1984); *Franklin v. Gwinnett County Public Schs.*, ___ U.S. ___, 112 S. Ct. 1028 (1992). Nonetheless, the lower courts remain confused and in conflict. The Third Circuit's decision is a grave erosion of the right of an individual to enforce fundamental constitutional rights. That is why this case merits review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE IMPORTANCE OF CONSTITUTIONAL RIGHTS, AND ASSESSES BROAD LIMITATIONS ON RIGHTS WHICH HAVE ALWAYS BEEN CONSIDERED FUNDAMENTAL.

A. This Court's Decisions Create Only a Very Narrow Exception To the Use of Section 1983 To Enforce Constitutional Rights.

"Since 1871, when it was passed by Congress, Section 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Further, even without Section 1983, individuals would have the right to sue to enforce their constitutional rights. *Smith*, 468 U.S. at 1012, n. 15.

Because of the importance of the right of an individual to enforce constitutional rights, this Court has been careful to craft only the most limited and narrow exceptions to the broad reach of Section 1983. The issue in this case is the breadth of the exception first recognized by this Court in *Sea Clammers*, 453 U.S. at 1, where the Court held that the key to determining if Congress "intended to create a private right of action under a federal statute" was "the intent of the Legislature." *Sea Clammers*, 453 U.S. at 13.

Nothing in *Sea Clammers* suggests that Congress could extinguish the right of individuals to enforce constitutional rights. Indeed, the Court in *Smith* expressly suggested that it could not. *Smith*, 468 U.S. at 1012, n. 15. The *Sea*

Clammers doctrine applies only when the rights sought under the statute and those sought under the constitution are *identical*.

This Court's precedent is clear: in order for the *Sea Clammers* doctrine to preclude claims under Section 1983, the statute at issue (here, Title IX) must have either an "'express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement,'" or, "[i]n the absence of such an express provision, . . private enforcement [under Section 1983 is] foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 520-21 (1990) (*citing Wright v.*

Roanoke Redevelopment and Housing Authority, 479 U.S. at 423; *Sea Clammers*, 453 U.S. at 20). Title IX has no express provision foreclosing other remedies, and it has no express remedial scheme. Clearly, under this Court's precedent, the *Sea Clammers* doctrine cannot apply to Title IX.

It is ironic that the Third Circuit has ruled that Congress, by enacting a law designed to eliminate sex discrimination in education, actually intended to eliminate the protections that were already in existence.

B. The Application of the *Sea Clammers* Doctrine to Title IX Has Wrongly Extinguished The Right of Equal Protection From Education, and Conflicts With Decisions of This Court.

Title IX has been an enormously important tool in its twenty-year history in the advancement of women's rights in education. *See, e.g., Grove City College v. Bell*, 465 U.S. 555 (1984) (applying Title IX's prohibition of sex discrimination to financial aid given to students); *Franklin v. Gwinnett County Public Schs.*, ___ U.S. ___, 112 S. Ct. 1028 (1992) (applying Title IX to prohibit sexual harassment of students). Indeed, many of these cases have opened the doors for female athletes. *See, e.g., Yellow Springs Exempted Village Sch. Dist. Bd. Of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (rejecting Association rule which prohibited girls from

participating on boys' teams in any contact sport); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (affirming district court's reinstatement of women's fast pitch softball). Now, for the first time, because of the Third Circuit's aberrational decision, those very advancements made by women may be called into question.

Equal protection claims are also an essential tool in bringing about an end to sex discrimination, and, contrary to the *Sea Clammers* doctrine, all equal protection claims are not incorporated within the protections of Title IX. There are many situations where, for mainly technical reasons, Title IX does not offer protection, and the litigant's only source of relief lies in an equal protection claim. This Court's ruling in *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 732 (hold-

ing that university's refusal of admission of male nursing student violated the student's right of equal protection, even though Title IX did not apply) is one such example. *See also United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 151 (1st Cir. 1985) (holding that a civil rights action could be brought against all-male maritime academy, despite the fact that the academy, a merchant marine educational institution, was exempted by Title IX).

Indeed, *Mississippi Univ. for Women* is indistinguishable from the case at hand. There too, a male attempted to break into a traditionally female area -- nursing. Under the Third Circuit's application of the *Sea Clammers* doctrine, the equal protection claim that served as the basis for this Court's decision in that case would have been precluded. Moreover,

as *Mississippi Univ. for Women* was decided *after Sea Clammers*, it is clear that this Court did not intend for the *Sea Clammers* doctrine to preclude equal protection claims in cases that fit into one of the exceptions of Title IX.

Indeed, this case is a perfect example of why Title IX and equal protection claims must coexist. Here, the Third Circuit has articulated two technical reasons which might on remand result in a finding from the District Court that Title IX does not protect John Williams: (1) if field hockey is a sport which "involves" contact, (22a), or (2) if opportunities for boys in sports at Liberty High School have not been previously limited. (36a). There are no such exceptions for an equal protection claim -- indeed, under an equal protection analysis, courts all across this country have ruled that girls must be

allowed to play "boys" contact sports. *See, e.g., Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985)(football); *Saint v. Nebraska Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988)(wrestling); *Force v. Pierce City R-VI Sch. District*, 570 F. Supp. 1020 (W.D. Mo. 1983)(football). Under the language of Title IX's accompanying regulations, a girl who wanted to play "boys" football would not have that right. 34 CFR § 106.41. In addition, unlike Title IX, the right of equal protection does not require *both* current and prior discrimination before a remedy can e enforced.

Moreover, Title IX contains additional exceptions, for example, military educational institutions and educational institutions which have traditionally admitted members of only one sex are exempted. 20 U.S.C. § 1681(a)(4-5).

Therefore, under the Third Circuit's logic, a woman who sought admission to an all-male public school would have no cause of action under Title IX, and would be precluded from raising equal protection claims. Such a result is contrary to this Court's decision in *Mississippi Univ. For Women*.

The Third Circuit had no justification whatsoever to eliminate equal protection claims in Title IX cases. Title IX is silent as to Congress' intent to foreclose, or not to foreclose, actions under Section 1983. Therefore, the only way that the *Sea Clammers* doctrine could apply to Title IX would be if Title IX had a "comprehensive enforcement scheme." Far from having a comprehensive enforcement scheme, Congress failed to create <u>any</u> express cause of action under Title IX. Indeed, it was not until this Court held

in *Cannon v. University of Chicago*, 441 U.S. at 717, that Title IX had an *implied* right of action that private litigants had any remedy whatsoever under Title IX. Clearly, since Congress never provided any remedial scheme under Title IX, Congress could not have intended for the non-existent remedies under Title IX to foreclose the remedies under Section 1983. Therefore, the *Sea Clammers* doctrine cannot possibly preclude Section 1983 claims in cases involving Title IX.

The Third Circuit is the *only* circuit which has applied the *Sea Clammers* doctrine to Title IX cases, and it has done so only twice: first in *Pfeiffer v. Marion Center Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); and second, in the case below. In reaching the conclusion in *Pfeiffer* that the *Sea Clammers* doctrine applied to Title IX claims, the Third Circuit pro-

vided no reasoning, other than that other courts had applied the doctrine to other statutes (the Education of the Handicapped Act[2], the Age Discrimination in Employment Act[3]), and that one district court had applied it to Title IX. *Pfeiffer*, 917 F.2d at 789. The opinion

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2. Unlike Title IX, the Education of the Handicapped Act contains an extensive enforcement scheme, including specific hearing requirements, 20 U.S.C. § 1415(b) (1988), review procedures, 20 U.S.C. § 1415(c) (1988), the right to counsel and to present evidence, 20 U.S.C. § 1415(d)(1-2) (1988), the right to bring a civil action in district court regardless of the amount in controversy, 20 U.S.C. § 1415(e)(4)(A) (1988), and the right to recover attorneys' fees, 20 U.S.C. § 1415(e)(4)(B) (1988).

3. Unlike Title IX, the Age Discrimination in Employment Act contains a comprehensive enforcement scheme, including specific investigations and enforcement actions by the Equal Employment Opportunity Commission, 29 U.S.C. § 626 (1988), the right of the individual to bring a civil action, 29 U.S.C. § 626 (c) (1988), the right to trial by jury in such actions, 29 U.S.C. § 626(c)(2) (1988), and criminal penalties, 29 U.S.C. § 629 (1988).

did not analyze if Congress had expressly precluded Section 1983 actions, or if Congress had provided a comprehensive enforcement scheme. Clearly, had the panel in *Pfeiffer* analyzed these requirements, it would have determined that the *Sea Clammers* doctrine does not preclude Section 1983 claims in Title IX cases. In the case below, the Third Circuit applied the *Sea Clammers* doctrine solely because it was "bound" by the holding in *Pfeiffer*. (41a).

No other Circuit Court has expressly considered whether the *Sea Clammers* doctrine should apply to Title IX. However, there appears to be a conflict between the Third Circuit and other circuits, as at least four other circuits have considered equal protection claims on their merits, or have considered other remedies which existed prior to Title IX,

in cases involving claims or exceptions under Title IX. *See, e.g., Rowley v. Members of the Bd. of Educ. of the St. Vrain Valley Sch. Dist. RE-1J*, 863 F.2d 39, 40 (10th Cir. 1988) (*withdrawn due to mootness); Habetz v. Louisiana High Sch. Athletic Ass'n.*, 915 F.2d 164, 167 (5th Cir. 1990) (permitting attorney's fees under 42 U.S.C. § 1988 in Title IX case); *United States v. Massachusetts Maritime Academy*, 762 F.2d at 151 (1st Cir. 1985) (holding that, despite the fact that Maritime Academy, which refused to admit women, fell into exception of Title IX for merchant marine educational institutions, an action could still be brought against the academy under the Civil Rights Act); and *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 763 (2d Cir. 1990) (noting that Section 1983 claim in this case which raised Title IX was deficient as plaintiff

could not allege action "under color of state law"), *cert. denied*, 449 U.S. 943 (1991). At least four circuits, therefore, disagree with the Third Circuit's position that pre-existing remedies are precluded in Title IX cases by the *Sea Clammers* doctrine.

Moreover, after the decision in *Pfeiffer*, this Court decided another Title IX case, *Franklin v. Gwinnett County Public Schools*, ___ U.S. at ___, 112 S. Ct. at 1036, where the Court specifically noted that Congress did not intend to limit available remedies when it enacted Title IX. While the *Franklin* decision did not specifically consider whether the *Sea Clammers* doctrine applied to Title IX cases, this Court made clear in its discussion of the implied remedies under Title IX that: "Our reading of the two amendments to Title IX enacted after *Can-*

non leads us to conclude that *Congress did not intend to limit the remedies available in a suit brought under Title IX.*" *Id.* (emphasis added).

Since it is the intention of Congress which is key to the *Sea Clammers* analysis, this Court's view that Congress did not intend to limit remedies when it enacted Title IX shows that the *Sea Clammers* doctrine cannot be used to preclude Section 1983 claims brought in Title IX cases. Therefore, the Third Circuit's elimination of equal protection claims in Title IX cases was a mistake that must be corrected before other courts follow and eliminate equal protection claims altogether.

C. Under The Third Circuit Ruling, Schools May Apply The Title IX Regulations In A Manner Which Violates Equal Protection.

Another example of why Title IX and equal protection must coexist lies in the *unequal* application of Title IX, which occurred in this case.

The School District applies the contact sport exception only against boys and not against girls. There is no dispute that girls are eligible for all 22 teams at Liberty High School, including contact sports such as boys' football, and that the School District only applies the contact sport limitation to keep *boys* off teams. This unequal application of the regulation creates a precedent that the state may decide to apply the same statute to one gender and not the other, and, since equal protection claims are now

precluded in Title IX cases, individuals have no means to attack such an unconstitutional practice. Such a result is clearly contrary to the Constitution.

D. The Decision of the Court of Appeals Could Be Extended to Preclude Equal Protection Claims in Other Areas of the Law Where Congress Has Acted To Extend Civil Rights, But Has Been Silent On the Issue of Preclusion.

The consequences of the Circuit's decision go even beyond the prohibition of sex discrimination contained in Title IX. The procedures that the court believes are so extensive as to extinguish a Section 1983 cause of action to enforce the Fourteenth Amendment in this area are identical to the procedures utilized under both Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

45 CFR § 86.71 (HHS procedures for enforcement of Title IX, cross-referencing procedures for enforcement of Title VI contained at 34 CFR § 101.1 *et seq.*); 7 CFR § 15a.71 (same for Dept. of Agriculture); 34 CFR § 104.61 (HHS procedures for enforcement of Section 504 cross-referencing procedures for enforcement of Title VI); 7 CFR § 15b.42 (same for Dept. of Agriculture). Thus, if the Circuit's ruling is not overruled, it would amount to a wide-sweaping ruling that virtually all of the rights that have been established under the Civil Rights Acts of the last 30 years have extinguished all of the similar constitutional rights.

II. THE PETITION SHOULD NOT BE DENIED ON GROUNDS OF MOOTNESS

It is important that the Court decide these crucial issues now as the wheels of justice turn too slowly to pro-

tect the rights of Title IX litigants. John Williams was a freshman when this case was brought. He is now a senior. Numerous Title IX cases have been vacated as moot before coming to this Court because the litigants have graduated. *See, e.g., Cook v. Colgate Univ.*, 992 F.2d 17, 20 (2d Cir. 1993) (vacating as moot a district court order regarding a women's ice hockey team because all of the plaintiffs would graduate before it went into effect); *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) (vacating as moot a district court judgment allowing a boy to play on girls' volleyball team). Even this case, brought with a motion for a temporary restraining order when John Williams was a freshman, has taken over three years to come to this Court. If appellate courts decline to take cases such as these on the grounds of

mootness, the law set forth by the Third Circuit will never be corrected.

Despite the fact that John Williams intends to graduate from Liberty High School in June of 1994, even at that point this case will not be moot for several reasons. First, this case is a classic example of "capable of repetition, evading review." *See Honig v. Doe*, 484 U.S. 305 (1988). John Williams may continue to play field hockey in college, and thus, like Doe, is likely to "again be wronged in a similar way" and relief will continue to evade this Court's review. Second, John Williams has a right to damages under The Equal Protection Clause for the three years he has missed playing field hockey, as well as to attorney's fees. When this case returns to the District Court's jurisdiction, petitioners will amend their complaint to seek all

possible damages. Third, this case has a "great likelihood that the issue will recur between the defendant and the other members of the public at large" without ever reaching this Court. *See, id.*, at 335-36 (Scalia, J. dissent). Therefore, like abortion and election rights cases, Title IX cases fall within the narrow exception to the "capable of repetition" doctrine.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court grant this petition for a writ

of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: October 28, 1993

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Filed July 6, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1650

SARAH ANNE WILLIAMS; WAYNE WILLIAMS,
on behalf of their minor son,
JOHN WILLIAMS

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA,

Appellant

On appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Civil No. 90-06448)

Argued February 23, 1983

Before: SLOVITER, *Chief Judge*, MANSMANN
and SCIRICA, *Circuit Judges*

(Opinion Filed: July 6, 1993)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*

Can high school field hockey be considered a contact sport? The district court held that it could not as a matter of law. On this ground and others, we disagree with the trial court's entry of summary judgment against the School District, and remand because there are material fact issues to be resolved.

I.

Facts and Procedural History

When John Williams was fourteen years old and in ninth grade, he presented himself for the girls' field hockey team tryouts at Liberty High School, a public school in the School District of Bethlehem, Pennsylvania. He

had played intramural coed field hockey when he was in eighth grade at a middle school in the School District, but the high school has only a girls' field hockey team. After the tryouts, the coach made tentative position and team assignments based on each player's abilities. John, whose skills were average, would probably have played goalie on the junior varsity team. However, after school officials learned that John and another boy had been issued uniforms, the boys were instructed that they could not play on the girls' field hockey team.[1]

John's parents, plaintiffs Sarah and Wayne Williams filed this action in October 1990 against the School District of Bethlehem, challenging John's

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1. The second boy is not a party to this action.

exclusion from the girls' field hockey team. They made claims alleging violations of title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988), and its implementing regulation, 34 C.F.R. § 106.41 (1990); the Equal protection and Due Process clauses of the federal Constitution, under 42. U.S.C. § 1983 (1988); and the Equal Rights Amendment to the Pennsylvania Constitution (E.R.A.), Pa. Const. art. I, § 28.

Plaintiffs sought a permanent injunction, attorneys' fees, and costs. While the litigation was pending, they reached an agreement with the School District that for the fall 1991 sports season, John, then a sophomore, would be permitted to practice with the girls' field hockey team but not to play in interscholastic games.

Based on the undisputed facts that the School District limits player participation on the field hockey team to females and that John was not permitted to be a part of the Liberty High School team only because of that policy, the district court granted summary judgment on July 14, 1992 in favor of the plaintiffs, permanently enjoining the School District form excluding John from the Liberty High School girls' field hockey team. In holding that the School District violated title IX, the court held as a matter of law that field hockey is not a "contact sport" and that males "have previously been denied athletic opportunities," App. at 66, thereby holding inapplicable the exception in the implementing regulation for those situations. *See* 34 C.F.R. § 106.4(b) (1990). In sustaining the plaintiffs' federal

Equal Protection claim, the district court held, *inter alia*, that the School District's exclusionary policy was not necessary to preserve girls' athletic opportunities and that it was not justified by the goal of rectifying past discrimination against girls in athletics.[2]

In addition, without resolving what standard of scrutiny applied, the district could held that the Pennsylvania E.R.A. was violated because its coverage is "at lease as stringent" as the federal Equal Protection clause, which it had already found violated. After the grant of the permanent injunction, John, by then a junior, rejoined the field hockey

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2. The court did not expressly address the plaintiffs' federal Due Process claim.

team as a full participant for the fall 1992 season.

The School District appeals, We exercise plenary review over a district court's grant of summary judgment. *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 76 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

II.

Discussion

A.

Title IX

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988), prohibits sex discrimination in educational programs that receive federal

funding.[3] The Department of Health, Education, and Welfare (HEW) promulgated regulations implementing this general nondiscrimination principle.[4] These

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3. Although the School District initially argued in the district court that title IX does not apply to athletic programs that do not themselves receive federal funds, it eventually conceded, correctly, that title IX applies whenever any part of an educational program receives federal funding, which is the case here. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988).

4. This aspect of HEW's responsibilities was taken over by the Department of Education when it was created in 1979.

regulations, which appear in Part 106 of the Code of Federal Regulations, bar sex discrimination in a wide variety of education programs and facilities, including interscholastic athletics. Thereafter, HEW issued its final Policy Interpretation of the regulation applicable to athletics. *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter Policy Interpretation]. Although designed specifically for intercollegiate athletics, *Policy Interpretation* specifically states that "its general principles will often apply to ... interscholastic athletic programs which are also covered by regulation," and may be used for guidance by the administrators of such programs. *Id.* at 71, 413. We accord HEW's interpretation

of the regulation "appreciable deference." *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993); *see Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Subsection (a) of the applicable implementing regulation sets forth the general principle that:

> No person, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic ... athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a) (1990).

The School District does not dispute that John Williams was excluded from the Liberty High School field hockey team solely on the basis of sex. It

argues instead that its policy prohibiting boys from being members of the girls' field hockey team falls within both of the exceptions set forth in subsection (b), that which provides that a team may exclude members of one sex if the sport is "a contact sport" and that which requires try-outs by members of the excluded sex only when "athletic opportunities for members of that sex have previously been limited."

The text of subsection (b) provides that notwithstanding the general requirements of subsection (a),

> a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved in a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex have

> previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Id. § 106.41(b).

Under the regulation, a school has the general obligation to make athletic opportunities available to boys and girls. Insofar as this obligation applies to sponsorship of sports teams, the regulation expressly contemplates situations where there will be some accommodation other than making each team equally open to both sexes. As the Sixth Circuit has explained, the provisions of the title IX grant flexibility to the recipient of federal funds to organize its athletic program as it wishes, so long as

the goal of equal athletic opportunity is met. *See Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981)

The regulation does not preclude a school from maintaining a team for one sex only. Indeed, the *Policy Interpretation* specifically states that "In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women." 44 Fed. Reg. at 71,417-18. The touchstone of the regulation is to "effectively accommodate[] the interests and abilities of male and female athletes" so that individuals of each sex have the opportunity "to have competitive team schedules which equally reflect their abilities." *Id.* at 71,418. The

regulation requires a school to permit a member of the excluded sex to try out for the single-sex team only if the athletic opportunities of the excluded sex have previously been limited. Even if they have been so limited, exclusion is permitted if the sport involved is a contact sport. The contact sport exception is thus the broadcast exception recognized to the overarching goal of equal athletic opportunity.

1. *Contact Sport*

Because field hockey is not one of the sports expressly specified in the regulation as a contact sport, whether it can be so deemed depends on whether it is a sport "the purpose or major activity of which involves bodily contact." 34 C.F.R. § 106.419(b). Our task in reviewing the grant of summary judgment is to

ascertain whether the party against whom judgment was granted created a genuine issue of material fact. *Martin v. United Way*, 829 F.2d 445, 452 (3d Cir. 1987).

In support of their motion for summary judgment on the contact sport prong of the title IX inquiry, plaintiffs introduced the affidavits of four experts, each of whom concluded that field hockey is not a contact sport. In her affidavit, Lynn Ralston, Director of Development and Marketing for the Field Hockey Association of America, stated that "[f]ield hockey is technically, and according to the national and international rules which govern the play of the game, a non-contact sport." App. at 182. The affidavits of John Greer, Chairman of the Umpire Association of the Field Hockey Association of America, Richard Purser, U.S.A. National Coach of the

Men's Field Hockey team, and Richard Kentwell, U.S.A. National and Olympic field hockey coach, and World Cup and Olympic field hockey umpire, included the same conclusion.[5] All of these experts

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5. Plaintiffs also argue on appeal that field hockey should not be considered a contact sport because it is played coed at the adult level and because there will be no bodily contact with John Williams, who plays goalie. Assuming *arguendo* that John was slated as goalie on the junior varsity team, a matter which is not free from doubt, neither argument is relevant to the threshold question whether field hockey is a contact sport for purposes of the implementing regulation.

relied on the rules of play for field hockey promulgated by the National Federation of State High School Associations, which provide that almost all bodily contact or threatened bodily contact between players is a violation or foul.

In opposition to plaintiffs' summary judgment motion, the School District offered the affidavit of its expert, Vonnie Gros, Head Coach of the women's interscholastic field hockey team at Ursinus College in Collegeville, Pennsylvania. Gros was also Head Coach of the United States Women's Olympic Field Hockey Team from 1977 to 1984, of the women's teams at West Chester State University for thirteen years, and of the women's teams at Princeton University for four years. She has played on women's as well as coed teams. Based on her thirty years' experience with the sport, Gros

concluded that field hockey is a contact sport. Gros explained that the major activities of the sport of field hockey included running up and down the field attempting to score a goal or preventing the other team from doing so. She stated that these activities "inevitably produce and involve bodily contact," App. at 79, even though such contact is a violation of the rules of play. She concluded that field hockey is a contact sport because bodily contact "regularly occurs throughout the course of any competitive game." App. at 79.

The School District also relied on the testimony of Dominic Villani, Director of Athletics at Liberty High School, given at the hearing on a temporary restraining order. Villani stated that, based on his twenty-seven years of experience as a physical educator and as

a coach, field hockey is "definitely" a contact sport. App. at 30. Villani explained that a field hockey player is "going to use any skills and natural attributes of power, speed and strength ... to get to that ball. And because of the nature of the game, there is going to be contact. There is contact." App. at 30.

In holding that the School District had not created a factual dispute and that, as a matter of law, field hockey is not a contact sport, the district court relied on the fact that field hockey is not mentioned in the list of contact sports in the regulation, even though ice hockey is included, and that there are blanket prohibitions against bodily contact in the national Federation rules. The court dismissed the affidavit of Vonnie Gros as containing a legal

conclusion. Although the court acknowledged that some bodily contact may occur during field hockey play, it found that such contact was "incidental" only. Finally, the court stated that "none of the affiants asserted that bodily contact is the purpose or *a major activity* of field hockey." App. at 63 (emphasis added).

All of the parties agree that the "purpose" of field hockey, unlike boxing, wrestling, or football, does not involve bodily contact. We focus, therefore, on the alternative definition. We conclude that the district court erred in granting summary judgment on the basis of the record before it.

We note first that the district court may have misapprehended the legal inquiry. The regulation defines a contact sport as one "the purpose or major

activity of which *involves* bodily contact." There is a subtle but important distinction between whether a major activity of field hockey "involves bodily contact" (the regulation's language) or whether bodily contact "is the purpose or major activity of field hockey," the language used by the district court and the plaintiffs. *See* App. at 63; Appellees' Brief at 12, 13. The district court's inquiry as to the major activity suggests that bodily contact can be deemed a "major activity" of a sport only if it is sanctioned activity. We believe that limiting the inquiry in that way would be duplicative of the "purpose" inquiry. Instead, the "major activity" prong takes into account the realities of the situation on the playing field.

Gros's affidavit and Villani's testimony raised an issue of material

fact about whether a major activity of field hockey does indeed involve bodily contact. We see no reason why the district court labeled Gros's affidavit as a legal conclusion, inasmuch as Gros gave a reasoned explanation for her view in light of the realities of play, whereas the affidavits on behalf of Williams merely asserted a conclusion without any reference to actual activity during play.

It is not insignificant that the National Federation rules, introduced by the School District, require mouth protectors and shin guards, prohibit spiked shoes, require that artificial limbs be padded, and prohibit wearing jewelry. These rules suggest that bodily contact does in fact occur frequently and is expected to occur during the game.

There is very sparse precedent on this issue. In *Kleczek v. Rhode*

Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991), the court denied a preliminary injunction in similar circumstances, holding that a boy who sought to play on his high schools' girls' field hockey team was unlikely to succeed on the merits of his title IX or constitutional claims because even if bodily contact is incidental there may be a lot of it, and thus field hockey must be considered a contact sport for purposes of tile IX. *Id.* at 955-56;[6] *cf. Gil v. New*

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6. Although the *Kleczek* court erroneously believed that tile IX applies only where the athletic program itself receives federal funds, *see* note 3 *supra*, this was irrelevant to its decision because the court assumed that the title IX provisions
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Hampshire Interscholastic Athletic Ass'n., No. 85-E-646, slip op. at 4 (N.H. Super. Ct. filed Nov. 8, 1985) (unpublished decision) ("contact is illegal, [but] occasional forceful bodily contact and rigorous pittings of strength do occur"). Unlike the *Kleczek* court which, as a trial court, could make its own factfindings, we are not in a position to hold that field hockey must be considered a contact sport. We hold only that there is sufficient evidence on this record to preclude summary judgment for plaintiffs on that issue.

6.(...continued)
applied before proceeding with the analysis.

2. Previously Limited Athletic Opportunities

If it is determined that field hockey is a contact sport, no other inquiry is necessary because that will be dispositive of the title IX claim. Even if a sport is not a contact sport, and there is no team for the other sex in that sport, the implementing regulation requires that members of the excluded sex be permitted to try out for a single-sex team only if their athletic opportunities have "previously been limited." 34 C.F.R. § 106.41(b). In interpreting that language, the district court considered the composition of the athletic program at Liberty High School, which mirrors the team offerings in the School District of Bethlehem overall. The court compared the number of teams boys and those for girls, noting that as of 1989, each of

the two high schools in the School District has had ten boys' teams, ten girls' teams, and two coed teams. The court found that athletic opportunities for girls have surpassed those of boys because girls are permitted to try out for all twenty-two teams whereas boys may try out for only twelve, and it thus concluded that athletic opportunities for boys have "previously been limited."

Plaintiffs argue that even if we find that athletic opportunities for boys at Liberty High School have not been limited, the School District would still be in violation of title IX because it is clear that opportunities for boys in the sport of field hockey have previously been limited. Plaintiffs thus would interpret the regulation's inquiry with respect to prior opportunities as sports-specific, in this case focusing on boys'

opportunities in a traditionally female sport. This reading of the regulation language was adopted by the court in *Gomes v. Rhode Island Interscholastic League,* 469 F. Supp. 659, 664 (D.R.I.) (holding that exclusion of boy from girls' volleyball team impermissible because boys' opportunities had been limited in that sport), *vacated as moot,* 604 F.2d 733 (1st Cir. 1979).

We believe that the contrary interpretation adopted by the New York and New Hampshire courts is more persuasive. In *Mularadelis v. Haldane Central School Board,* 427 N.Y.S.2d 458, 461-64 (N.Y. App. Div. 1980), the court looked at the phrase at issue in the context of the entire regulation. The court noted that the first clause expressly refers to a "particular sport" ("where a recipient operates or sponsors a team in a particu-

lar sport"), and the second clause uses broad and general language, defining the inquiry as whether "athletic opportunities" for members of the excluded sex have previously been limited. *Id.* If Congress had intended the inquiry into "athletic opportunities" to be limited to a "particular sport," it would have so stated, particularly since the phrase "particular sport" was used earlier in the same sentence. *Id.*[7]

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7. Moreover, HEWS's interpretation, issued contemporaneously with the regulation, requires inquiry into athletic opportunities "at the institution in question" rather than in the particular sport. The final regulation was accompanied by explanations addressing comments and

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This analysis convinced the Superior Court of New Hampshire, which adopted it in *Gil v. New Hampshire Interscholastic Athletic Association*, No. 85-E-646, slip op. at 31-32. We agree. As the School District argues, if the plaintiffs' construction were adopted, there could never be a situation in a non-contact sport in which a team was limited to a single sex without a corresponding team

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7.(...continued)
questions received by the agency, which stated, "if tennis is offered for men and not for women and a woman wishes to play on the tennis team, *if women's sports* have previously been limited *at the institution in question* that woman may compete for a place in the 'men's' team." *See* 40 Fed. Reg. 24,143 (June 4, 1975) (emphasis added).

for the other sex because, by definition, the opportunities in that particular sport will be limited for the excluded sex. It would mean that boys will always be able to argue that they had previous limited athletic opportunities just because certain sports have traditionally been considered women's sports, such as field hockey. This would render nugatory the purpose of the phrase in question, which was intended to authorize single sex teams in certain circumstances.

We believe the district court was correct in implicitly rejecting the plaintiffs' sports-specific interpretation, and in looking instead to the overall athletic opportunities.

We conclude, however, that the district court applied a flawed analysis in holding as a matter of law that athletic opportunities for boys were previ-

ously limited at Liberty High School because girls have been able to try out for more teams than boys for almost two decades. The mere opportunity to try out for a team, which the district court found tipped the balance in favor of girls in the School District, is not determinative of the question on "previously limited" athletic opportunities under title IX. "Athletic opportunities" means real opportunities, not illusory ones. If, to satisfy title IX, all that the School District were required to do was to allow girls to try out for the boys' teams, then it need not have made efforts, only achieved in 1989, to equalize the numbers of sports teams offered for boys and girls.

The School District produced evidence that its decision in or about 1975 to allow girls the right to try out

for all twenty-two teams did not equalize athletic opportunities between the sexes. Dominic Villani testified: "I don't believe that the fact that girls are allowed to try out for boys[']] sports would help any problem of inequality. In the 27 years I have been in this business, I believe I have seen two girls that had tried out for a given sport and at best were carried on the team. It did not displace any boys." App. at 28. He concluded that "when you have girls involved in boys[']] sports with respect to displacing someone, you are talking about the exception. And exceptions are very, very few." App. at 28-29.

Whether the opportunity for girls to try out for a boys' team is a realistic athletic opportunity with respect to that particular sport may turn on whether there are real and significant

physical differences between boys and girls in high school. There was conflicting evidence introduced by the parties on this issue.

Plaintiffs offered evidence to show that the physical differences between boys and girls of high school age are negligible.[8] In opposition, the School District offered the affidavit of its expert, Evan G. Pattishall III, M.D.,

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8. For example, plaintiffs introduced statistics from *Current Pediatric Diagnosis and Treatment* (10th ed. 1991), which indicates that at age 14, 95% of boys weigh between 84 and 157 pounds and are between 58.2 and 69.2 inches tall, and 95% of the girls weigh between 83 and 160 pounds and are between 58.4 and 67.3 inches tall. App. at 184, 185.

Assistant Professor of Pediatrics at the Medical School of Pennsylvania State University, who testified that high school boys on average have "greater height, weight, total body strength, upper body st[r]ength and aerobic capacity . . . [as well as] a greater quantity of lean body mass . . . and sustained muscle power and sustained physical activity." App. at 82.[9]

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9. The School District also calls to our attention other statistics in *Current Pediatric Diagnosis and Treatment* which reveals that size and weight differences between boys and girls become more pronounced through the high school years. Appellant's Brief at 29-30 (citing App. at 184, 185).

It follows that in determining whether boys' athletic opportunities at Liberty have previously been limited, the factfinder must decide whether meaningful physiological differences between boys and girls of high school age negate the significance of allowing girls to try out for boys' teams but not allowing the reverse.

Because the district court erred in finding dispositive the mere opportunity for girls to try out without acknowledging that the School District had created a material issue of fact as to the effect of that opportunity, we will reverse the grant of summary judgment on the plaintiffs' title IX claim and remand for further factual development on the issue whether athletic opportunities for boys have previously been limited.

In this connection, we must note that although title IX and the regulation apply equally to boys as well as girls, it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges. *see, e.g., Cohen*, 991 F.2d at 892. Indeed, the *Policy Interpretation* notes that "[p]articipation in intercollegiate sports has historically been emphasized for men but not women." 44 Red. Reg. at 71,419. With specific reference to high school athletics, the *Policy Interpretation* states: "During the period from 1971-1978 . . . the number female participants in organized high school sports increased from 294,000 to 2,083,000 - an increase of over 600 per-

cent." *Id.* This growth was reflected in increased athletic participation of women on the campuses of the nation's colleges and universities. *Id.* Despite this increased participation, the *Policy Interpretation* reflects concern over the effect of prior discrimination. The *Policy Interpretation* requires continued affirmative steps, which "[i]n most cases . . . will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels." *Id.* at 71,414. Thus it is clear that the obligation of an educational institution in complying with the requirements of title IX in interscholastic athletics cannot be measured simply by comparing the number of teams available to each sex, but instead must turn on "[w]hether disparities of a substantial and unjusti-

fied nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole." *Id.* at 71,417.

B.

Federal Constitutional Claims

In an extended discussion, the district court upheld the plaintiffs' claim that the School District's policy precluding boys from playing field hockey violated the federal Constitution's Equal Protection clause. The School District argues that the plaintiffs' constitutional claims under 42 U.S.C. § 1983 are precluded because they are based on a matter fully addressed by the comprehensive scheme in title IX.

The Supreme Court has made clear that where a federal statute pro-

vides its own comprehensive enforcement scheme, Congress intended to foreclosure a right of action under section 1983. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981).[10] This court recently ad-

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10. The plaintiffs argue that because the School District did not rely on *Sea Clammers* in the district court, it should be precluded from doing so here. We reject that contention because of our strong duty to decide a case on nonconstitutional grounds whenever possible. As we have previously stated, "The Supreme Court has on several occasions even applied the doctrine when the nonconstitutional ground was not presented by the parties but was first noticed (continued...)

dressed the applicability of the *Sea Clammers* doctrine to cases in which plaintiff asserts a claim under title IX and the federal Constitution. In *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 789 (3d Cir. 1990), we held that the constitutional claims are "subsumed" in title IX, and that the district court, having addressed the title IX claim, properly refused to hear plaintiff's section 1983 claim.

10.(...continued)
by the Court itself." *Allen v. Aytch*, 535 F.2d 817, 820 (3d Cir. 1976) (referring to *Rosenberg v. Fleuti*, 374 U.S. 449 (1963)); *see Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960) (per curiam); *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955) (per curiam); *Peters v. Hobby*, 349 U.S. 331 (1955).

Plaintiffs argue that the *Sea Clammers*, doctrine is inapplicable where an injunction is sought, but in Pfeiffer plaintiff also sought an injunction, and we are bound by that holding.

The district court in the instant case acknowledged that *Sea Clammers* rendered its discussion of the constitutional claims unnecessary, but chose to proceed, *inter alia*, "for the sake of completeness." App. at 67 n.5. The court should have been guided instead by the Supreme Court's admonition that courts should exercise restraint before reaching federal constitutional claims. We will therefore not reach the constitutional issues, and will vacate the district court's judgment on the section 1983 claim.

C.

Pennsylvania Equal Rights Amendment

In granting the plaintiffs' motion for summary judgment, the district court did not separately discuss the Pennsylvania E.R.A. claim because it concluded that once it found that the School District violated the federal Equal Protection clause, the School District necessarily violated the Pennsylvania E.R.A. We will therefore review the court's federal Equal Protection analysis as if it were made in the Pennsylvania E.R.A. context, and apply the same plenary review as we have done on the other claims.

The Pennsylvania E.R.A. provides that

> [e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Pa. Const. art. I, § 28. The provision applies equally to men and to women, see Swidzinski v. Schultz, 493 A.2d 93, 95-96 (Pa. Super. 1985), and, according to the Supreme Court of Pennsylvania, its purpose is

> to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will

> not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.

Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (invalidating statute permitting only women to receive alimony after divorce).

The Court has stated, "In this Commonwealth, sex may no longer be accepted as an exclusive classifying tool." *Commonwealth v. Butler*, 328 A.2d 851, 855 (Pa. 1974) (invalidating criminal statute prohibiting minimum sentences for women while allowing them for men); *see also Hartford Accident & Indem. Co. v. Insurance Comm'r*, 482 A.2d 542 (Pa. 1984) (striking differential insurance rates for the sexes); *Commonwealth ex. rel. Spriggs v. Carson*, 368 A.2d 635 (Pa.

1977) (abolishing "tender years" presumption used in awarding custody to mother); *Commonwealth v. Santiago*, 340 A.2d 440 (Pa. 1975) (invalidating presumption that wife who commits crime in the presence of her husband was coerced); *Hopkins v. Bianco*, 320 A.2d 139 (Pa. 1974) (extending to married women the right to claim damages for loss of consortium).

Although the Supreme Court of Pennsylvania has not addressed the E.R.A. in the context of interscholastic athletics, in a thoughtful opinion the Commonwealth Court made clear that if the classification between boys and girls in connection with team sports is based on impermissible assumptions and stereotypes about the comparative characteristics or abilities of boys and girls, the E.R.A. will be violated. *Commonwealth ex. rel. Packel v. Pennsylvania Interscholastic*

Athletic Ass'n., 334 A.2d 839, 843 (Pa. Commw. 1975) (athletic league provision barring girls from participating in sports with boys violates E.R.A. because it embodies the stereotype that girls are generally weaker and boys generally more skilled at athletics). However, after the Commonwealth Court's decision in *Packel*, the Pennsylvania Supreme Court decided *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), where it accepted the view prevailing among jurisdictions with a state E.R.A. that

> the E.R.A. does not prohibit differential treatment among the sexes when, as here[,] that treatment is reasonably and genuinely based on physical characteristics unique to one sex.

Id. at 125 (quotation omitted).

In defending the E.R.A. claim, the School District argued that because of the undeniable physical differences between girls and boys of high school age, sex was the only classification feasible for accomplishing, *inter alia*, the legitimate and substantial interest of promoting athletic opportunities for girls. As we noted in our discussion of title IX, the parties introduced conflicting evidence on the extent of physical differences between boys and girls at the high school level. Some of the evidence supports the School District's argument that the differences between the sexes increase dramatically through high school, and that by age sixteen, these differences are substantial.

The validity of the School District's policy excluding boys from the field hockey team depends on whether

there are "physical characteristics unique to [boys]" which warrant differential treatment. If there are real physical differences between high school boys and high school girls, then the sexes are "not similarly situated as they enter into most athletic endeavors," *Petrie v. Illinois High School Ass'n*, 394 N.E. 2d 855, 863 (Ill. App. Ct. 1979), and exclusion based on sex may be justified, *see Bartholomew ex rel. Bartholomew v. Foster*, 541 A.2d 393, 397 (Pa. Commw. 1988) ("The only types of sexual discrimination . . . permitted in this Commonwealth are those which are reasonably and genuinely based on physical characteristics unique to one sex.") (quotation omitted), *aff'd without opinion*, 563 A.2d 1390 (Pa. 1989).

The district court found resolution of the dispute on physical differ-

ences "completely unnecessary" because there was no evidence to suggest that more than a handful *of boys* would ever express interest in playing field hockey. Only four girls have ever tried out for boys' teams in the School District (two for football and two for soccer), and only two boys, including John Williams, have tried out for girls' teams (field hockey).

We believe that resolution of this factual dispute cannot be avoided. Whether boys will be interested in trying out for the field hockey team is irrelevant to the issue whether real physical differences between boys and girls justify differential treatment, in this case, the exclusion of boys' teams. Under Pennsylvania law, as expressed most recently by the state's Supreme Court in *Fischer*, the legality of the School Dis-

trict's policy can only be resolved by deciding whether there are genuine physical differences between boys and girls or whether, instead, the policy is based on unwarranted and stereotyped assumptions about the sexes. That issues raises a fact question which precludes summary judgment.

A related dispute between the parties concerns whether permitting boys to play on the girls' teams will result in boys' eclipsing girls' athletic opportunities in the School District. Plaintiffs pointed out, as noted above, that few students have tried out for or joint teams designated for the other sex. They also contended that, far from negatively affecting girls' athletic opportunities, allowing boys on the team will increase those opportunities because, during at least one sports season, Liberty High

School had "barely" the minimum number of female players to field a team. Finally, plaintiffs asserted that because field hockey at Liberty High School is a "no cut" team, boys can never displace girls from the team.

The School District countered with the argument that if more boys are allowed on the team and permitted to play, more girls will warm the bench during the field hockey matches. It also presented the testimony of Villani that if positions on the field hockey team were open to girls and boys, "eventually boys would dominate, eliminating the opportunities of females." App. at 28. Gros agreed that male players' physical characteristics give them a significant competitive advantage over female players.

Nonetheless, the district court, again relying on the facts that few boys have expressed an interest in the sport and that no cuts are made from the Liberty High School field hockey team, found that admitting boys would not displace girls from play. In our view, the district court must resolve the factual issue as to physical differences before it can determine whether boys are likely to displace girls from the team. *Compare Cape v. Tennessee Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) ("[i]t takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement") *and Gil*, No. 85-E-646, slip op. at 26 ("Boys, as a class, are un-

doubtedly better physiologically equipped to play field hockey than are girls.") with *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 293 (Mass. 1979) ("No doubt biological circumstance does contribute to some overall male advantages. But we think the differences are not clear or uniform as to justify a rule in which sex is sought to be used as a kind of 'proxy' for a functional classification"). For reasons we have already explained, this issue must be resolved at trial.

Ultimately, the validity of the classification will depend on the relationship between the classification and the government interest. Unfortunately, the Supreme Court of Pennsylvania has not yet addressed the proper level of scrutiny under the E.R.A. The district court wrote that the scrutiny must be "at

least as stringent" as that under the federal Equal Protection clause. App. at 77. Plaintiffs argue that the standard must be more stringent, else there was no reason for the Pennsylvania legislature to adopt the equal rights amendment in the first place. *See Newberg v. Board of Pub. Educ.*, 26 Pa. D. & C.3d 682, 710 (Ct. Com. Pl. 1983).

Although we do not agree that this is the only reason for passage of state equal rights amendments, *see* Chai R. Feldblum, Nancy Fredman Krent, & Virginia G. Watkin, *Legal Challenges to All-Female Organizations*, 21 Harv. C.R.-C.L. L. Rev. 171 (1986), there is much to commend application of heightened scrutiny to sex-based classifications. However, we are hesitant to decide this uniquely state law matter before the state's highest court has done so unless

we have no other course. It is not clear that the level of scrutiny will be dispositive in this case, because the School District policy may be able to meet even the strict scrutiny standard. *See Holdman v. Olim*, 581 P.2d 1164, 1168 (Haw. 1978).

The School District argues that the classification bears a substantial relationship to an important governmental interest, using the standard denominated as intermediate and applied in cases such as *Craig v. Boren*, 429 U.S. 190, 197 (1976). The plaintiffs' argument for a strict scrutiny test would lead to the inquiry whether the School District's rule bears a necessary relationship to a "compelling state interest." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 40 (1985). We do not understand the plaintiffs to argue that the

School District's interest in maximizing athletic opportunities for female students would not satisfy strict scrutiny, and thus in this case we need not dwell on the difference, if any, between a "compelling" or "important" government interest.

On the other hand, we cannot avoid choosing the level of scrutiny because the disposition could turn on whether the classification bears a "necessary" relationship rather than a "substantial" relationship to the goal. Until the Pennsylvania Supreme Court has spoken on that issue, it is the better course to use the standard more favorable to the plaintiff under the state E.R.A. in light of the strong state policy to equalize opportunities for the sexes.

The School District also proffered the need to rectify past inequality

in competitive interscholastic athletic opportunities for female students as a legitimate goal for its policy limiting the hockey team to girls. The district court rejected the importance of this goal on the ground that "most, if not all, of [the Liberty High School students] were not .. in existence" at the time of the unequal past practices "in the sixties and seventies." App. at 69. This narrow view of the need to rectify past discrimination overlooks the possibility that the vestiges of longstanding discriminatory practices may still inhibit high school girls from actively pursuing athletic opportunities.

Moreover, the record shows that the discriminatory practices continued far beyond the sixties and seventies. It was not until 1989 that the School District finally had an equal number of

boys' and girls' teams. We agree with the Ninth Circuit that "[t]here is no question that [redressing past discrimination against women in athletics] is a legitimate and important governmental interest." *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131-32 (9th Cir. 1982) (citing *Petrie*, 394 N.E.2d at 862), *cert. denied*, 464 U.S. 818 (1983); *B.C. v. Board of Educ.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. 1987).

We will therefore remand the E.R.A. claim to the district court for factfinding as to whether there are any real physical differences between boys and girls that warrant different treatment, and whether boys are likely to dominate the school's athletic program if admitted to the girls' teams. Only then will it be possible to determine whether the School District's policy of excluding

boys from girls' teams is necessary to the School District' recognized interest in preserving meaningful athletic opportunities for girls, *see Petrie*, 394 N.E.2d at 862-64, and/or whether there is a current need to rectify the admittedly pervasive past discrimination against female high school students with respect to athletic opportunities, *see Clark*, 695 F.2d at 1131.

III.

Conclusion

In summary, the district court's order granting summary judgment for the plaintiffs will be reversed. We do not foreclose the School District from moving for summary judgment on the title IX claim based on its affidavits, thereby shifting the burden to the plaintiffs to produce evidence demonstrating a genuine

issue of material fact precluding summary judgment. If the district court determines that the School District is entitled to summary judgment on the title IX claim, then our precedent would counsel dismissal of the pendent E.R.A. claim which could then be maintained in state court.

SCIRICA, *Circuit Judge*, concurring.

I join in the court's opinion, but write separately because I believe in the rules of field hockey and conclusory opinions set forth in affidavits submitted by Williams do not create a genuine issue of material fact on whether field hockey is a contact sport. Had the school district moved for summary judg-

ment on the Title IX claim on this record,[11] I would have granted it.

This dispute centers on whether a "major activity" of field hockey involves bodily contact. Williams contends field players who raise their sticks, charge, push, trip, or personally handle an opponent, or engage in "rough or dangerous play," Nat'l Fed'n of State High Sch. Ass'n, *Field Hockey Rules* 16-17, 24-25 (1990-91).[12] In support,

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11. Of course, once a motion for summary judgment is filed, the adverse party may respond under Fed. R. Civl. P. 56(e).

12. In rejecting the School District's argument that field hockey is a *contact sport*, the district court held 34. C.F.R. § 106.4(b)'s failure (continued...)

Williams produced the affidavits of four experts, each of whom stated:

> Field hockey is *technically*, and *accord-*

12.(...continued)
to include field hockey among its examples of contact sports "suggest[ed] that this sport was not recognized as a contact sport when the rule was drafted." But the textual examples in the regulation are illustrative, not inclusive. The regulation does not mention other contact sports such as lacrosse, soccer, and water polo. *See* 34 C.F.R. § 106.(b) ("contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact").

> *ing to the Rules* of the Game of Hockey, a non-contact sport.
>
> Unlike sports like boxing, wrestling, rugby, ice hockey, football and basketball, field hockey does not involve contact as its purpose of major activity.

(emphasis added).

Whether field hockey is a contact sport cannot turn solely on the rules.[13] The focus must be on the

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13. The district court held: "[i]t defies logic to conclude that bodily contact is a purpose or major activity of field hockey when a team may be penalized not only when its players or a ball hit by one of its players contacts another player, but also when such contact is threatened or likely."

realities of play. High school basketball rules forbid a player from "hold[ing], push[ing], trip[ping], []or imped[ing] the progress of an opponent." Nat'l Fed'n of State High Sch. Ass'n *Basketball Rules* at 52-53 (1990).[14] Yet basketball is a contact sport and is cited as such in 34 C.F.R. § 106.41(b). Although basketball's rules penalize charging into an opponent, collisions occur as players compete for possession of the ball. Similarly, in field hockey, players compete for possession of the ball. Collisions occur and, for purposes of § 106.41(b), it is of little consequence that such conduct violates the rules. That contact is penalized cannot be dispositive.

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14. The basketball rules are part of this record.

Williams' experts' conclusions that "field hockey does not involve contact as its ... major activity" contains another flaw. As the majority observes, slip op. at 9, there is a subtle but significant difference between asking whether "field hockey ... involve[s] contact as its major ... activity," the language used in Williams' affidavits, and asking whether "the major activity of [field hockey] involves bodily contact," the language used in § 106.41(b). Major activities of field hockey include running, advancing the ball, checking, shooting and blocking. These activities inevitably involve bodily contact.

In remarkable contrast to Williams' affiants, the School District's affiants emphasized the realities of the

game. Vonnie Gros, a veteran coach and player,[15] testified:

> The major activities of the sport of field hockey includ[e] running up and down the field in order to move the ball towards the opponent's goal or to prevent the opposing team from doing so. These activities inevitably produce and involve bodily contact, as players compete at close quarters for possession or control of the ball. Although physical contact is in most cases a violation of the rules for which the official has the option of calling a penalty, such contact regularly occurs throughout the course of any competitive game. Because its major activities

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15. As the majority notes, Gros coached the U.S. Women's Olympic Field Hockey Team from 1977 to 1984.

> involve bodily contact, I consider field hockey to be a "contact sport." Field hockey certainly cannot be called a "non-contact" sport.

Similarly, Dominic Villani, Director of Athletics at Liberty High School, stated that players positioning for the ball will "bump [and] joust ... [in] a small area. So there is [sic] going to be collisions." Based on twenty-seven years of coaching experience Villani testified:

> [Y]ou know, [as player] I have every right to that ball as the opponent does and I am going to use any skills and natural attributes of power, speed and strength ... to get to that ball. And because of the nature of the game, there is going to be contact. There is contact.

> And I would make the analogy, as Title IX does, they label basketball as a contact sport. And I have observed many basketball games, and I have observed a number of field hockey games. And taken in that context, field hockey - girls' field hockey would definitely be a contact sport.

The girls' field hockey coach, Martin Romeril, also emphasized the realities of the game:

> There is contact in field hockey because you have players occupying potentially the same space. This would happen in any sport when two players want to occupy the same space, obviously, there's going to be contact so there is some contact in field hockey.

As the majority observes, the "affidavits on behalf of Williams merely asserted a conclusion without any reference to actual activity during play." Slip op. at 9. In my view, this evidence fails to create a genuine issue of material fact.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

SARA ANNE and WAYNE WILLIAMS on behalf of their minor son, JOHN WILLIAMS,	)	CIVIL ACTION
	)	NO. 90-6448
Plaintiffs	)	
vs.	)	
THE SCHOOL DISTRICT OF BETHLEHEM, PA.,	)	
Defendant	)	

TROUTMAN, S.J.

O R D E R

And now, this 9th day of July, 1992, upon consideration of plaintiffs' Motion for Summary Judgment, (Doc. #13), and defendant's response thereto, IT IS HEREBY ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of the plaintiff and against the defendant.

IT IS FURTHER ORDERED that the Bethlehem School District is permanently enjoined from excluding John Williams from the field hockey team based solely upon his gender.

/s/

S.J.

EASTERN DISTRICT OF PENNSYLVANIA

SARA ANNE and WAYNE WILLIAMS on behalf of their minor son, JOHN WILLIAMS,	)	CIVIL ACTION
Plaintiffs	)	NO. 90-6448
vs.	)	
THE SCHOOL DISTRICT OF BETHLEHEM, PA.,	)	
Defendant	)	

TROUTMAN, S.J.

M E M O R A N D U M

Plaintiff John Williams is a male student at Liberty High School in the Bethlehem School District. In August, 1990, at age 14, John Williams and another male student tried out for the school's field hockey team, which participates in an interscholastic schedule of games. Williams was selected for the

junior varsity squad as a goalie and began practicing with the team. He was issued equipment and a team uniform. At the end of August, however, the school district notified the coach that boys are not permitted to play on the girls' field hockey team and ordered that Williams neither practice with the team nor participate in the games.

The instant action by Sarah and Wayne Williams to restore their son to the Liberty High School field hockey team was commenced on October 5, 1990, accompanied by a Motion for Preliminary Injunction. Subsequently, on October 15, 1990, plaintiff filed a Motion for Temporary Restraining Order. That motion was joined with the preliminary injunction motion and heard on October 16, 1990. The preliminary injunction/temporary restraining order was denied on the

record upon the Court's conclusion that plaintiffs had failed to prove irreparable harm, a necessary element of the emergency equitable relief sought in the motions. (Hearing Transcript, Doc. #8, at 51).

Thereafter, the case proceeded through discovery and the parties were able to reach a partial compromise for the 1991 field hockey season whereby John Williams was permitted to practice with the team but not permitted to play in the interscholastic games. Presently before the court is plaintiffs' motion for summary judgment, which should dispose of the case in time for the 1992 scholastic field hockey season.

Plaintiffs assert that the defendant's exclusion of John Williams from the girls' field hockey team, which effectively bars him from playing that

sport since there is no school field hockey team for boys, violates Title IX of the Education Amendments of 1972, (20 U.S.C. §1681, et seq.), and its implementing regulations, the Pennsylvania Constitution, specifically the Equal Rights Amendment thereof, and both the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution.

It is undisputed that the defendant school district limits player participation on the field hockey team to female students[1] and that John Williams

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1. It appears that male students can be non-playing managers of the field hockey team, can perform such functions as time-keepers and score-keepers, and that John Williams has
(continued...)

was dismissed from his position on the Liberty High School junior varsity field hockey team only because of that school district policy. Thus, it is undisputed that John Williams has been prevented from playing interscholastic field hockey solely on the basis of his gender. The ultimate issue before the Court, therefore, is whether the school district's action was proper in light of the laws applicable to gender classifications in scholastic athletic programs. We will begin our consideration of this issue with plaintiffs' federal statutory claims, and will address defendant's

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1.(...continued)
continued to participate in the field hockey program in these capacities since his exclusion as a player. (See, Complaint, Doc. #1, ¶¶ 21, 27).

arguments that disputed issues of material fact preclude summary judgment as such arguments become relevant to the legal issues.

I. Title IX of The Education Amendments of 1972

Pursuant to 20 U.S.C. §1681(a), popularly known and hereafter referred to as Title IX, students are protected from gender discrimination in educational programs and activities which receive federal financial assistance. Plaintiffs here contend that the Bethlehem School District athletic programs are subject to the Title IX prohibition against discrimination on the basis of sex and that the defendant's announced policy of preventing males from player participation on the field hockey team, which is desig-

nated as a girls' sports team, violates that statute.

Defendant first argued that Title IX is inapplicable in that its athletic programs do not receive federal financial assistance, but now concedes that the Civil Rights Restoration Act of 1987, 20 U.S.C. §1687, specifies that Title IX is fully operative when any part of an educational program or any local or state educational entity receives federal financial assistance. Defendant, therefore, further concedes that its argument concerning the applicability of Title IX has been vitiated insofar as that argument was based upon the absence of federal money for its athletic programs. (See, Addendum to Brief of Defendant in Opposition to Plaintiff's Summary Judgment Motion, Doc. #26 at 2). Defendant continues to argue, however, that its

policy of prohibiting boys from playing on the field hockey team does not violate a Title IX in that field hockey is a contact sport and athletic opportunities for boys have not previously been limited in the Bethlehem School District. (Id.).

These arguments arise from the defendant's interpretation of the portion of Title IX's implementing regulations which address athletic programs, found at 34 CFR §106.41. In subparagraph (a) thereof, the rule states the general proposition that,

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by the recipient, and no

> recipient shall provide any such athletics separately on such basis.

This general rule is qualified by subparagraph (b), however, to permit separate teams under certain conditions, i.e.,

> Notwithstanding the requirements of paragraph (a) of this section, a receipt may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of

> the excluded sex must be allowed to try-out for the team offered unless the sport is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

As noted, the defendant here relied upon the provisions of §106.41(b) to support its policy of prohibiting boys from playing on the designated girls' teams. In their motion for summary judgment plaintiffs contend that the school district's policy with respect to the field hockey team is a blatant and obvious violation of Title IX and the foregoing rule, and that the Court can so determine as a matter of law. In response to the motion, defendant argues

that there are issues of material fact in dispute, specifically, in this context, whether field hockey is a contact sport and whether athletic opportunities for boys have previously been limited.[2]

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2. We recognize that defendant has identified other issues of material fact which it contends are disputed and relevant to the issues before the Court. As noted above, the contentions concerning material facts in dispute will be considered in the context of our discussion of the various legal issues. We conclude that these are the facts which are relevant and material to our discussion of Title IX. Insofar as these facts may also have an impact on other legal issues to be dis-

(continued...)

As is obvious from the plain language of the applicable regulation, the defendant cannot lawfully exclude boys from the field hockey team unless we determine that field hockey is a contact sport, and that boys' athletic opportunities have not been previously limited, since a boys' field hockey team is not offered. Pursuant to §106.41(b), the school district is required to permit boys to try-out for a girls' team if there is no boys' team for the particular sport, which is here admitted, if the sport is not a contact sport and if athletic activities for the excluded sex, here the boys, have previously been limited.

2.(...continued)
cussed, such facts will likewise be considered in those contexts.

Despite defendant's vigorous attempt to create an issue of fact for trial concerning whether field hockey is a contact sport, we conclude that it is not for purposes of the athletic regulations under Title IX. In the first instance, a number of contact sports are enumerated in §106.41(b), including ice hockey. The omission of field hockey suggests that this sport was not recognized as a contact sport when the rule was drafted.

Second, the rules of play for high school field hockey define as a violation or foul virtually every activity on the field which involves bodily contact between field hockey players or between a player's body and the ball, as well as practices which could lead to bodily contact or which threatens such contact, e.g., raising the stick during

play and hitting the ball in a manner which might cause it to be propelled through the air. (See, Exhibit J to Plaintiffs' Motion for Summary Judgment, Doc. #13). It defies logic to conclude that bodily contact is a purpose or major activity of field hockey when a team may be penalized not only when its players or a ball hit by one of its players contacts another player, but also when such contact is threatened or likely.

Finally, although it is clear from the affidavits of experienced players and coaches given on behalf of both sides that some bodily contact will inevitably occur in the heat of a field hockey game, none of the affiants asserted that bodily contact is the purpose

or a major activity of field hockey.[3]

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3. We recognize, of course, that the Ursinus College field hockey coach, Vonni Gros, took an affidavit in which she states that she considers field hockey a contact sport and that bodily contact regularly occurs in the course of field hockey games.

We note, however, that, for purposes of our inquiry, her opinion with respect to whether field hockey is a contact sport amounts to legal conclusion, which we are not obliged to accept. Moreover, her conclusion is not supported by the plain language of the regulation. It is clear that the description of a contact sport under §106.41(b) does not include a

(continued...)

Thus, we conclude that field hockey is not a contact sport as that term is defined in §106.41(b) of the regulations implementing Title IX.[4]

3.(...continued)
sport in which bodily contact is incidental to the purpose or to the major activities thereof, as stated in the Gros affidavit. Rather, for purposes of the regulation, the issue is whether bodily contact is involved in the purpose or in a major activity of the sport Thus, we do not consider the opinions expressed in the Gros affidavit to create a genuine issue of material fact.

4. In addition, we note in passing that although the defendant here relies upon the contact sports exception to
(continued...)

4.(...continued)
the general requirement of equal opportunity and non-discrimination in sports programs to support its policy of keeping a boy from participating as a player on a girl,s' team, this exception is not applied in the case of girls trying out for the boys' teams, including those identified as contact sports in §106.41(b). (See, Preliminary Injunction Hearing Transcript, Doc. #8 at 31). Obviously, therefore, the defendant uses a "double standard", based on gender, in applying Title IX to its sports teams. It is doubtful whether such blatantly unequal application of the same regulation to boys and girls is lawful. It
(continued...)

4.(...continued)
appears to the Court that if protecting female students from contact sports is a primary and legitimate concern of the school district, it would invoke the contact sports exception with respect to girls trying out for the football and wrestling teams, as permitted by the regulation, whether or not there has been past limitation of athletic opportunities for girls. Instead, the defendant school district appears to believe that it may legitimately apply the literal terms of §106.41(b), a regulation designed to eliminate gender discrimination in athletic programs, to support gender-based discrimination in its

(continued...)

Next, we must determine whether the second Title IX criterion supports the defendant's policy of excluding boys from the field hockey team by considering whether athletic opportunities for males, the sex excluded from the field hockey team, have previously been limited. Defendant assumes, without presenting any evidence in support thereof, that athletic opportunities for boys at Liberty High School have been limited. The evidence, however belies that unsupported conclusion.

In testimony concerning past limitations of athletic opportunities, the defendant's Director of Athletic Plant Management, Dominic Villani, re-

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4.(...continued)
sports program when, as and if defendant concludes that such discrimination is warranted.

ferred to the situation in the late sixties and early seventies when girls had limited athletic opportunities. Now, however, according to Villani, the defendant is proud of having equalized athletic opportunity by creating an equal number of teams for boys and girls at Liberty High School and by permitting girls to try-out for all of the boys' teams as well as all of the girls' teams. (See, Doc. #8 at 20, 31).

In fact, the record demonstrates that as a consequence of this plan for expanding opportunities for girls in athletics, such opportunities are now limited for boys and have been since 1973 when the new athletic policies were implemented. (Id.). In an effort to comply with Title IX, the defendant has established at Liberty High School ten sports teams which are exclusively

for girls, ten teams designated as boys' teams but for which the girls may also try-out, and two teams designated as co-ed. (Id.; Deposition of Dominic Villani at 58, 59, Exh. C to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Doc. #24). Thus, since the new policies were implemented, boys have been permitted to try-out for twelve teams, while girls could try-out for all twenty-two teams offered at Liberty High School. (Id.). Moreover, a girl who is good enough could play on a boys' team for which there is no comparable girls' team, such as wrestling, as well as on a boys' team in a sport for which there is also a girls' team, such as basketball. On the other hand, a boy such as the plaintiff in this case, who wishes to play a non-contact sport for which a

boys' team is not offered, may not try-out or play for the girls' team.

The question arises whether after at least eighteen years of giving girls more athletic opportunities than offered to the boys, the defendant can reasonably base its athletic policies upon the assumption that boys have not "previously" been denied opportunities in athletics, and, therefore, whether the defendant can maintain an exclusively girls' team for a non-contact sport when no comparable boys' team exists. It appears to the Court that the term "previously" refers to a reasonable time in the past, and does not hearken back to the beginning of interscholastic athletic programs. In addition, it is reasonable to construe the term "previously" to include current limitations on athletic opportunities. Thus, it further appears

that where there has been at least eighteen years of limitations on athletic opportunities for boys and that such limitations are presently in force, the Title IX requirement of previous limitation on athletic participation for the excluded sex has been met.

We conclude, therefore, that, in this instance, defendant is violating Title IX by excluding boys from the field hockey team since there is no boys' team for that sport, field hockey is a non-contact sport and the excluded sex, males, have previously been denied athletic opportunities.

II. §1983 Claims[5]

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5. Having already decided that the defendant violated a federal statute, Title IX, by barring John Williams from the field hockey team, and because the statute "provides its own comprehensive enforcement scheme,", we are not required to address plaintiff's constitutional claims. Pfeiffer v. School Board for Marion Center Area, 917 F.2d 779, 789 (3d Cir. 1990), quoting Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). We do so, however, for the sake of completeness.

(continued...)

A. Equal Protection

There appears to be no dispute between the parties concerning the standard for determining whether defendant's admitted gender discrimination denies male students equal protection of the law. Since there is no dispute that male

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5.(...continued)
Moreover, we consider the Fourteenth Amendment Equal Protection analysis particularly useful in guiding our consideration of plaintiffs' pendent claim under the Equal Rights Amendment to the Pennsylvania Constitution, although the latter may require a higher degree of scrutiny of gender classification than the Equal Protection clause. Haffer v. Temple University, 678 F. Supp. 517 (E.D. Pa. 1987).

and female students are treated differently in defendant's athletic program, the burden is on defendant to justify its gender-based classification by demonstrating that the policy it seeks to uphold serves important governmental objectives and that barring boys from the field hockey team is substantially related to achieving such objectives. Haffer v. Temple University, 678 F. Supp. 517 (E.D. Pa. 1987).

Plaintiffs contend that the school district's policy of keeping John Williams from playing on the Liberty High School field hockey team violates the Equal Protection clause of the Fourteenth Amendment in that its gender-based discrimination is not substantially related to any important government interest.

In the first instance, plaintiffs do not agree that the reasons de-

fendant cites to support gender classifications in athletics are important enough to justify discrimination against boys. Plaintiffs also argue that the school district's policy of barring boys from the field hockey team is not substantially related to achieving the defendant's asserted goals of remedying past discrimination against girls in the defendant's athletic opportunities for female students, even if such interests are sufficiently important to justify some disparate treatment of male students with respect to athletic programs.

We note that defendant has identified several factual issues which it contends are both disputed and material to the determination whether the interests it asserts are important enough to justify its policy of prohibiting boys from the field hockey team, as well as

whether such policy is substantially related to furthering those interests. The purported factual disputes include the extent of the physiological differences between boys and girls at the high school level, the degree to which permitting boys on the field hockey team would reduce opportunities for girls to play, the extent to which girls experienced past discrimination and the extent to which alternative to banning boys from the field hockey team would be practical, workable and effective to remedy the asserted past discrimination and to assure continued equality of opportunity in athletics. As will become clear in our discussion of the defendant's justification of its policy, however, these issues are not really in dispute, and/or are not actually material in that there is insufficient justification for the defendant's

gender discrimination regardless of whether such issues might be resolved in favor of the defendant at a later trial.

We consider first defendant's contention that its present policy is justified as a remedy for past discrimination against girls in its athletic program. Based upon our prior analysis of the relative athletic opportunities currently offered by defendant to boys and girls in connection with plaintiff's Title IX claim, we reject defendant's contention that it is currently proper to limit opportunities for boys in its sports programs.

Our earlier comments, concerning the need to select a reasonable time-frame as a reference for determining whether past practices justify present policies, apply with equal force in this context. The defendant supports its

admittedly discriminatory policy of prohibiting boys from playing on the field hockey team by the purported need to redress problems which existed in the sixties and seventies. For the current students of Liberty High School the years for which the school district is still trying to make amends is equivalent to prehistoric times, since most, if not all, of them were not then in existence. Thus, we conclude that with respect to Liberty High School, providing a remedy for past discrimination against girls in athletics does not presently constitute a government interest important enough to justify the current and continuing policy of prohibiting male students from trying out and playing for designated girls' teams when no comparable boys' team is offered. We do not, therefore, need to determine whether there is a substantial

relationship between this objective and the means chosen to address it.

Our conclusion is different, however, with respect to defendant's announced concern with maintaining opportunities for girls to participate in athletics. Defendant argues, and we accept as a truism which hardly needs extensive evidentiary support, that boys, on average, have a size and weight advantage over girls at the high school level, and that such advantage increases between ages fourteen and eighteen, the usual span encompassed by the high school years. Moreover, we recognize that a rule of law which permits absolutely no distinctions in high school sports programs in order to accommodate such differences might ultimately restrict athletic opportunities for girls and, therefore, create a new imbalance in

sports programs in favor of male students.

Nevertheless, the facts that awareness of and accommodation to biological differences between males and females in high school athletic programs may, in appropriate circumstances, be substantially related to the important government interest of maintaining equality of athletic opportunity does not here establish that the defendant's policy of absolutely prohibiting any boy from participating on any team designated as a girls' team is substantially related to furthering the identified interest. As noted in Haffer, 678 F. Supp. at 524, "Although differential treatment, with respect to a particular sport, is permitted when the record reveals relevant physical differences, overbroad and unsupported generalizations regarding the

athletic abilities of males and females will be rejected." (Citations omitted).

This is so because reliance upon such overbroad generalizations often leads to the type of overbroad policy, such as that at issue here, which represents a government entity's attempt to develop a formula to be applied by rote as a substitute for thoughtful consideration of specific situations and evaluation and adjustment of actions and practices as necessary to assure equal opportunity. Regardless of the value of that goal, policies based upon stereotypes are not the appropriate means for reaching it, and, moreover, provide no assurance that the desired objective will thereby be achieved.

With respect to the defendant's reliance upon undeniable physical difference between boys and girls as a

rationale for prohibiting all boys from participating on all designated girls' teams, it is clear from the evidence produced by the defendant in opposition to summary judgment that unsupported assumptions and broad generalizations underlie that policy. The substance of defendant's argument is that the average boy is bigger, stronger, faster and has a longer reach than the average girl. Permitting any boy, therefore, to try-out and play for the field hockey team will have the effect of flooding the team with boys, who will then certainly dominate it to the exclusion of girls who wish to play field hockey.

The small amount of evidence in this record which is based upon past and current facts rather than upon assumptions and speculation concerning future developments does not, however, support

defendant's contention. The defendant's experience, based upon the history of the number of girls trying out for boys' teams compared to the number of boys who have sought to try-out for the girls' field hockey team, indicates that the interest among boys and girls in playing on a team designed for the opposite sex is both small and approximately equal. According to the testimony of Dominic Villani, two girls have gone out for boys' teams in such cross try-outs have been permitted at Liberty High School. (See, Doc. #8 at 24; Exh C to Doc. #24 at 16). As noted, another boy tried out for the field hockey team in 1990 along with John Williams, (See, Testimony of John William, Doc. #8 at 5), and Villani testified that he thought two boys had previously tried out for a girls' team, although it is somewhat unclear whether

that number referred specifically to the field hockey team and whether the other boy who tried out for the team in 1990 was included. Although Villani expressed his personal opinion that if boys are permitted to play on the field hockey team the number of boys desiring to do so would increase over the years, he gave no basis for such opinion and it is obvious that it is not based upon his experiences in the Bethlehem School District or upon his knowledge of the level of interest in field hockey among boys.

The only other evidence concerning the general interest of boys in playing field hockey in the Bethlehem School District suggests that Villani's speculation is nothing more than a baseless attempt to justify a discriminatory policy. Villani himself testified that there is insufficient interest among boys

to justify an attempt to organize a boys' field hockey team in the district. (Doc. #8 at 20, 21; Exh. C at Doc. #24 at 16, 17). Moreover, it is obvious that this lack of interest among boys does not arise from lack of opportunity for boys to familiarize themselves with the sport, since the school district offers a coed field hockey program at the junior high level. (Doc. #8 at 4). Finally, Villani testified that even if the Bethlehem School District offered a boys' field hockey team, there would be no other teams against which to compte. Thus, it appears that lack of interest in field hockey among boys is common. This inference is supported by the affidavit of Lynn Ralston, Director of Development of the Field Hockey Association of America, who stated that because field hockey has traditionally been perceived as a women's

sport, the biggest obstacle in promoting the sport generally lies in convincing boys that they can play. (Exh. 8 to Plaintiffs' Motion for Summary Judgment, Doc. #13).

It appears from all of the foregoing facts and reasonable inferences to be drawn therefrom that there is a demonstrated lack of interest in playing on girls' teams in general among males at Liberty High School, as well as a general lack of interest among males in playing field hockey at all.

Moreover, defendant's assertion that permitting boys to play on the girls' field hockey team would certainly deprive at least one girl of the opportunity to play is likewise unsupported by the evidence. First, according to the uncontradicted testimony of the Liberty High School field hockey coach, Martin

Romeril, girls' interest in field hockey fluctuates. (Exh. D. to Doc. #13 at 25). In one season, there were only eleven girls on the junior varsity squad, barely enough to field a team. (Id.). Thus, in any given year, it is possible that the presence of one or more boys on the field hockey team could enhance girls' opportunities to play by assuring that there are sufficient players on the team.

Second, the coach testified that it was his policy to permit all potential players who try-out for the team to join, and to play in the games, at least on the junior varsity level. (Id., at 41). As a general proposition, therefore, defendant's assertion that having even one boy on the field hockey team would absolutely diminish opportunities for girls to play is based upon speculation and assumptions of a worst

case scenario rather than upon experience or reasonable expectations.

We conclude that the evidence of record establishes that defendant's fears concerning the purported potential of boys to dominate the field hockey team to the detriment of girls' athletic opportunities are completely unfounded or so ephemeral as to be insufficient justification for a policy which discriminates against boys in order to protect equal athletic opportunities for girls. With respect to this issue, defendant has relied entirely upon opinions which have no identifiable underlying factual support as its basis for asserting that disputed issues of material fact preclude summary judgment, or upon undisputed facts which are immaterial to the asserted interest. It is completely unnecessary, e.g., to determine the ex-

tent of the physiological differences between boys and girls at the high school level. Although, on average, such differences may be substantial, that fact is no material to the defendant's position in light of the lack of evidence supporting defendant's assertions that permitting boys on the field hockey team would lead to dramatic increase in the number of boys who wish to play field hockey and thereby reduce opportunities for girls to play. Likewise, although the question whether the average physiological differences between boys and girls might give boys a competitive advantage over girls in playing field hockey could be considered a disputed issue of fact, it is immaterial for the same reason.

We further conclude that it is unnecessary to determine the extent to

which alternatives to banning boys from the girls' field hockey team would be feasible as a means to further the defendant's interest in maintaining equal athletic opportunities since there is no evidence to support the proposition that permitting boys to play for the field hockey team would impact that interest.

B. Due Process

Having already concluded that defendant's policy of banning boys from the field hockey team constitutes a violation of the Equal Protection clause in that defendant cannot demonstrate that such policy is substantially related to an important government interest, we find it necessary to address in detail plaintiff's argument with respect to the due Process clause.

We note, however, that we find somewhat problematic the question whether affording the plaintiff notice and an opportunity to be heard before banning him from the field hockey team would have made any difference to him. He was undeniably cut from the team on the basis of a school district policy which was in effect at the time, and could not have prevailed at a hearing, after notice that he was in jeopardy of being dismissed from the team, absent a determination that the policy upon which his dismissal was based is unlawful. Thus, although defendant's actions may constitute a due process violation, it is questionable

whether such a finding would lead to an effective remedy in this case.

III. Equal Rights Amendment to the Pennsylvania Constitution

It appears that in the absence of a definitive pronouncement by the Pennsylvania Supreme Court, the lower courts have had some difficulty in determining the appropriate standard to apply in assessing whether a gender-based policy such as that at issue here violates the Pennsylvania Equal Rights Amendment (ERA). See, e.g., Haffer v. Temple University, 678 F. Supp. at 534-536. It further appears, however, that the level of scrutiny to be applied is at least as stringent as that applicable to analysis

of claims under the Equal Protection clause. Indeed, that is the standard which defendant assets ought to be applied to plaintiff's ERA claim.

We have no difficulty, therefore, in concluding that if defendant's policy violates the Equal Protection clause, it likewise violates the Pennsylvania ERA.

IV. Summary

Since we have concluded that defendant's policy of banning boys from the field hockey team at Liberty High School on the basis that it is a designated girls' team is unsupportable under Title IX of the Education Amendments of 1972, an, in addition, that it violates both the Equal Protection clause of the United States Constitution and the Pennsylvania Equal Rights Amendment, we will

enter judgment in favor of the plaintiffs and order that John Williams be permitted to participate in field hockey at Liberty High School on the same basis as female students.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1650

SARAH ANNE WILLIAMS; WAYNE WILLIAMS,
on behalf of their minor son,
JOHN WILLIAMS

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA,

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO,
ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by Appellees Sarah Anne Williams and Wayne Williams in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who con-

curred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Chief Judge

Dated: July 30, 1993

7 CFR § 15a.71

§ 15a.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to Title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 7 CFR 15.5-15.11 and 7 CFR 15.60 et seq.

7 CFR § 15b.42

§ 15b.42 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 7 CFR 15.5-15.11 and 15.60-15.143.

20 U.S.C. § 1415

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a handicapped

child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit --

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or education placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any mat-

ter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded --

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children.

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in

such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In

any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relieve as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have the jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of his subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if --

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that --

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable

skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of

the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of education institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is

carrying out a plan for such a change which is approved by the Secretary of Education, whichever is later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military service or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be

provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarships or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists

with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

28 U.S.C. § 1254

§ 1254. Court of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses, investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for

subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for

amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any persons aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall

terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion.

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on

administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation

shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

42 U.S.C. § 2000d, et seq.

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or

order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be

secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds to such action. No such action shall become effective until thirty days have elapsed after the filing of such report.
(Pub L. 88-352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

DELEGATION OF FUNCTIONS

Function of the President relating to approval of rules, regulations, and orders of general applicability under this section, delegated to the Attorney

General, see section 1-101 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note below.

EQUAL OPPORTUNITY IN FEDERAL EMPLOYMENT

Nondiscrimination in government employment and in employment by government contractors and subcontractors, see Ex. Ord. No. 11246, eff. Sept. 24, 1965, 30 F.R. 12319, and Ex. Ord. No. 11478, eff. Aug. 8, 1969, 34 F.R. 12985, set out as notes under section 2000e of this title.

EXECUTIVE ORDER NO. 11247

Ex. Ord. No. 11247, eff. Sept. 24, 1965, 30 F.R. 12327, which related to the enforcement of coordination of nondiscrimination in federally assisted programs, was superseded by Ex. Ord. No. 11764, eff. Jan. 21, 1974, 39 F.R. 2575, formerly set out as a note below.

EXECUTIVE ORDER NO. 11764

Ex. Ord. No. 11764, Jan. 21, 1974, 39 F.R. 2575, which related to coordination of enforcement of the provisions of this subchapter, was revoked by section 1-501 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72996, set out as a note below.

Ex. Ord. No. 12250. Leadership and Coordination of Implementation and Enforcement of Nondiscrimination Laws

Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, provided:

By the authority vested in me as President by the Constitution and statutes of the United States of America, including section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), and Section 301 of Title 3 of the United States Code, and in order to provide, under the leadership of

the Attorney General, for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance, it is hereby ordered as follows:

1-1. DELEGATION OF FUNCTION

1-101. The function vested in the President by Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.

1-102. The function vested in the President by Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), relating to the approval of rules, regulations, and orders of general applica-

bility, is hereby delegated to the Attorney General.

1-2. COORDINATION OF NONDISCRIMINATION PROVISIONS

1-201. The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws:

(a) Title Vi of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(b) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

(c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794).

(d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall on the ground of race,

color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

1-202. In furtherance of the Attorney General's responsibility for the coordination of the implementation and enforcement of the nondiscrimination provisions of laws covered by this Order, the Attorney General shall review the existing and proposed rules, regulations, and orders of general applicability of the Executive agencies in order to identify those which are inadequate, unclear or unnecessarily inconsistent.

1-203. The Attorney General shall develop standards and procedures for taking enforcement actions and for con-

ducting investigations and compliance reviews.

1-204. The Attorney General shall issue guidelines for establishing reasonable time limits on efforts to secure voluntary compliance, on the initiation of sanctions, and for referral to the Department of Justice for enforcement where there is noncompliance.

1-205. The Attorney General shall establish and implement a schedule for the review of the agencies' regulations which implement the various nondiscrimination laws covered by this Order.

1-206. The Attorney General shall establish guidelines and standards for the development of consistent and effective recordkeeping and reporting requirements by Executive agencies; for the sharing and exchange by agencies of compliance records, findings, and supporting

documentation; for the development of comprehensive employee training programs; for the development of effective information programs; and for the development of cooperative programs with State and local agencies, including sharing of information, deferring of enforcement activities, and providing technical assistance.

1-207. The Attorney General shall initiate cooperative programs between and among agencies, including the development of sample memoranda of understanding, designed to improve the coordination of the laws covered by this Order.

1-3. IMPLEMENTATION BY THE ATTORNEY GENERAL

1-301. In consultation with the affected agencies, the Attorney General shall promptly prepare a plan for the implementation of this Order. This plan

shall be submitted to the Director of the Office of Management and Budget.

1-302. The Attorney General shall periodically evaluate the implementation of the nondiscrimination provisions of the laws covered by this Order, and advise the heads of the agencies concerned on the results of such evaluations as to recommendations for needed improvement in implementation or enforcement.

1-303. The Attorney General shall carry out his functions under this Order, including the issuance of such regulations as he deems necessary, in consultation with affected agencies.

1-304. The Attorney General shall annually report to the President through the Director of the Office of Management and Budget on the progress in achieving the purposes of this Order. This report shall include any recommendations for

changes in the implementation or enforcement of the nondiscrimination provisions of the laws covered by this Order.

1-305. The Attorney General shall chair the Interagency Coordinating Council established by Section 507 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794c).

1-4. AGENCY IMPLEMENTATION

1-401. Each Executive agency shall cooperate with the Attorney General in the performance of the Attorney General functions under this Order and shall, unless prohibited by law, furnish such reports and information as the Attorney General may request.

1-402. Each Executive agency responsible for implementing a nondiscrimination provision of a law covered by this Order shall issue appropriate implementing directives (whether in the nature of

regulations or policy guidance). To the extent permitted by law, they shall be consistent with the requirements prescribed by the Attorney General pursuant to this Order and shall be subject to the approval of the Attorney General, who may require that some or all of them be submitted for approval before taking effect.

1-403. Within 60 days after a day set by the Attorney General, Executive agencies shall submit to the Attorney General their plans for implementing their responsibilities under this Order.

1-5. GENERAL PROVISIONS

1-501. Executive Order No. 11764 is revoked. The present regulations of the Attorney General relating to the coordination of enforcement of Title VI of the Civil Rights Act of 1964 [this subchapter] shall continue in effect until re-

voked or modified (28 CFR 42.401 to 42.415).

1-502. Executive Order No. 11914 is revoked. The present regulations of the Secretary of Health and Human Services relating to the coordination of the implementation of Section 504 of the Rehabilitation Act of 1973, as amended [29 U.S.C. 794], shall be deemed to have been issued by the Attorney General.

1-503. Nothing in this Order shall vest the Attorney General with the authority to coordinate the implementation and enforcement by Executive agencies of statutory provisions relating to equal employment.

1-504. Existing agency regulations implementing the nondiscrimination provisions of laws covered by this Order shall continue in effect until revoked or modified.

Jimmy Carter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2000d-2, 2000d-5, 5057, 9821, 9849 of this title; title 39 section 410.

§ 2000d-2. Judicial review; administrative procedure provisions

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of

such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

(Pub. L. 88-352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

CODIFICATION

"Chapter 7 of title 5" and "that chapter" were substituted for "section 10 of the Administrative Procedure Act" and "that section", respectively, on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees. Prior to the enactment of Title 5, section 10 of the Administrative Procedure Act was classified to section 1009 of Title 5.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2930c, 2971c, 2985g, 5057, 9821, 9849 of this title; title 39 section 410.

§ 2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

(Pub. L. 88-352, title VI, § 604, July 2, 1964, 78 Stat. 253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 39 section 410.

§ 2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(Pub. L. 88-352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 39 section 410.

§ 2000d-5. Prohibited deferral of action on applications by local educational agencies seeking Federal funds for alleged noncompliance with Civil Rights Act

The Secretary of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress) [20 U.S.C. 236 et seq.], by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress) [20 U.S.C. 631 et seq.], or by the Cooperative Research Act [20 U.S.C. 331 et seq.], on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is

given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Secretary, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided*, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this sub-

chapter, insofar as the matters covered in the order or judgment are concerned. (Pub. L. 89-750, title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub. L. 90-247, title I, § 112, Jan. 2, 1968, 81 Stat. 787; Pub. L. 96-88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 89-750, Nov. 3, 1966, 80 Stat. 1191, as amended, known as the Elementary and Secondary Education Amendments of 1966. For complete classification of that Act to the Code, see Short Title of 1966 Amendment note set out under section 2701 of Title 20, Education, and Tables.

The Elementary and Secondary Education Act of 1965, referred to in text, is Pub. L. 89-10, Apr. 11, 1965, 79 Stat.

27, as amended generally by Pub. L. 95-561, Nov. 1, 1978, 92 Stat. 2152, which is classified generally to chapter 47 (§ 2701 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of Title 20 and Tables.

The Act of September 30, 1950, referred to in text, is act Sept. 30, 1950, ch. 1124, 64 Stat. 1100, as amended, popularly known as the Educational Agencies Financial Aid Act, which is classified generally to chapter 13 (§ 236 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 236 of Title 20 and Tables.

The Act of September 23, 1950, referred to in text, is act Sept. 23, 1950, ch. 995, as amended generally by Aug. 12,

1958, Pub. L. 85-620, title I, 72 Stat. 548, which is classified generally to chapter 19 (§ 631 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Tables.

The Cooperative Research Act, referred to in text, is act July 26, 1954, ch. 576, 68 Stat. 533, which was classified generally to chapter 15 (§ 331 et seq.) of Title 209, Education, and terminated on July 1, 1975, under provisions of section 402(c)(1) of Pub. L. 93-380, title IV, Aug. 21, 1974, 88 Stat. 544. See section 1851 et seq. of this title. For complete classification of this Act to the Code, see Tables.

CODIFICATION

Section was enacted as part of the Elementary and Secondary Education Amendments of 1966, and not as part of the

Civil Rights Act of 1964, title VI of which comprises this subchapter.

AMENDMENTS

1968-Pub. L. 90-247 added to the proviso to this section.

EFFECTIVE DATE

Section 191 of Pub. L. 89-750 provided that: "The provisions of this title [enacting this section and sections 241m, 871 to 880, and 886 of Title 20, Education, amending sections 241b, 241c, 241e, 241f, 241g, 241h, 241j, 241k, 241l, 244, 331a, 332a, 332b, 821, 822, 823, 841, 842, 843, 844, 861, 862, 863, 864, 883, and 884 of Title 20, repealing section 241d of Title 20, and enacting provisions set out as notes under sections 241a, 241b, and 241c of Title 20] shall be effective with respect to fiscal years beginning after June 30, 1966, except as specifically provided otherwise."

TRANSFER OF FUNCTIONS

"Secretary of Education" and "Secretary", were substituted for "Commissioner of Education" and "Commissioner" pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of Title 20, Education, and which transferred all functions of the Commissioner of Education of the Department of Health, Education, and Welfare, to the Secretary of Education.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000d-6 of this title.

§ 2000d-6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies

(a) Declaration of uniform policy

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the

Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] and section 182 of the Elementary and Secondary Education Amendments of 1966 [42 U.S.C. 2000d-5] dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity

Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]

(d) Additional funds

It is the sense of the Congress that the Department of Justice and the Secretary of Education should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States.
(Pub. L. 91-230, § 2, Apr. 13, 1970, 84 Stat. 121; Pub. L. 96-88, title III,

§ 301, title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsecs. (a) and (c), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Civil Rights Act of 1964 is classified generally to this subchapter (§ 2000d et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

CODIFICATION

Section was enacted as part of the Elementary and Secondary Education Amendments of 1969, and not as part of the Civil Rights Act of 1964, title VI of which comprises this subchapter.

TRANSFER OF FUNCTIONS

"Secretary of Education" was substituted for "Department of Health, Education, and Welfare" in subsec. (d) pursuant to sections 301 and 507 of Pub. L. 96-88, which are classified to sections 3441 and 3507 of Title 20, Education, and which transferred functions and offices (relating to education) of the Department and Secretary of Health, Education, and Welfare to the Secretary of Education.

34 CFR § 101.1 *et seq.*

§ 101.1 Scope of Rules.

The rules of procedure in this part supplement §§ 100.9 and 100.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Education, pursuant to Title VI of the Civil Rights Act of 1964 (section 602, 78 Stat. 252) and part 100 of this subtitle.

34 CFR § 104.61

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6-100.10 and part 101 of this title.

34 CFR § 106.41

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for

members of one sex but operates or sponsors no such team for members of the opposite sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-

secondary level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

45 CFR § 86.71

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated hereby by reference. These procedures may be found at 45 CFR 80-6 through 80-11 and 45 CFR Part 81.

(2)

Supreme Court, U.S.
FILED
NOV 29 1993
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No. 93-686

In The

Supreme Court of the United States

October Term, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS,
on behalf of their minor son,
JOHN WILLIAMS,

Petitioners,

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

May the comprehensive equal protection remedies intended by Congress to be available under Title IX to victims of gender discrimination in federally-funded educational institutions be bypassed or duplicated by resort to the catch-all provisions of 42 U.S.C. § 1983?

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No. 93-686

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THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The Respondent School District of Bethlehem (hereinafter "School District") is a Pennsylvania public school district which offers its male and female students the opportunity to compete in a variety of interscholastic sports. The School District offers teams for boys in ten sports, teams for girls in ten sports, and co-ed teams in two sports. However, this level of competitive opportunity for girls has existed only since 1989, and is the result of continual efforts by the School District since 1968 to increase the range of opportunities for girls. Prior

to 1968, when nine sports teams were offered for boys, basketball was the only sport offered for girls.

Prior to 1975, neither boys nor girls in the School District were permitted to join teams designated for the opposite sex. Since 1975, School District policy has permitted girls to try out for and (if athletically qualified) compete on boys' teams, as is required under the ruling of the Pennsylvania Commonwealth Court in *Commonwealth by Packel v. Pennsylvania Interscholastic Athletic Association*, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975). In *Packel*, the Commonwealth Court held that athletically qualified girls who desire to face the disadvantages and risks of competition on boys' sports teams must, under the Equal Rights Amendment to the Pennsylvania Constitution, be permitted to do so.[1]

The Pennsylvania courts have not yet examined whether Pennsylvania's Equal Rights Amendment, PA. CONST. Art. 1, § 28, requires that boys be allowed to try out for and compete on girls' teams. Present School District policy does not permit boys to try out for and compete on teams which are designated for girls. The School District maintains this policy because of the gross physiological differences between high school age males and females which provide males an unfair competitive advantage in athletic competition, an advantage which is most pronounced in contact sports such as field hockey.

---

[1] The *Packel* ruling, as a matter of state law, effectively prohibits the School District from applying the contact sport rule contained in Title IX's implementing regulations at 34 C.F.R. § 106.41(b) to exclude girls from boys' teams in contact sports.

The School District believes that its policy is necessary to create and preserve an equal opportunity for girls to participate in interscholastic athletic competition, and to prevent boys from displacing girls from the available team positions and playing time. The School District also believes that its efforts to remedy previous inequity in its sports program would be set back if girls were forced to compete with boys for places on the girls' teams.

Petitioner John Williams is a high school senior who wants to play on the School District's girls' field hockey team, but who is ineligible for the team under the School District's policy because he is a boy. Williams tried to join the team in August, 1990, but was told he was ineligible for it in accordance with the School District policy. The School District does not have a boys' field hockey team.

After Williams brought suit to challenge the policy in October 1990, the District Court denied Williams' request for a preliminary injunction. In July, 1991, Williams moved for summary judgment in his favor, which the District Court granted on July 14, 1992, permanently enjoining the School District from excluding Williams from the field hockey team solely on account of his gender. 779 F.Supp. 513 (E.D. Pa. 1992). The School District appealed the District Court's decision to the United States Court of Appeals for the Third Circuit, which on July 6, 1992 reversed the decision of the District Court and remanded the matter for trial on disputed factual issues. 998 F.2d 168 (3d Cir. 1993).

The Court of Appeals denied Williams' petition for rehearing and rehearing en banc on July 30, 1993, and denied Williams' motion for stay of mandate on August

13, 1993. Williams' further application to this Court for a stay of the Court of Appeals' mandate was denied on September 15, 1993 by Justice David H. Souter, sitting as Circuit Justice. There have been no further proceedings in the District Court since the issuance of the Court of Appeals' mandate on August 13, 1993. The School District's girls' field hockey team played the last game of its 1993 season on October 20, 1993.

REASONS FOR DENYING THE WRIT

Summary.

The end of the final field hockey season in which the relief sought by Williams could benefit him has rendered this action moot, and the review Williams seeks can no longer produce anything but an advisory opinion. Even were this not the case, further examination of the decision below is unwarranted.

The statutory and regulatory structure of Title IX, including broad private remedies as well as detailed administrative mechanisms, creates a comprehensive and effective enforcement scheme carefully tailored to fully serve equal protection interests in the educational settings to which it applies. Unfocused and parallel private remedies under § 1983 are both unnecessary and damaging to Title IX's fulfillment of the purposes intended by Congress.

The Court of Appeals' conclusion that additional § 1983 remedies are not available to those benefited by

Title IX is fully in accord with the previous pronouncements of this Court regarding the comprehensiveness of Title IX and the intention of Congress that such context-specific remedies be the exclusive means of equal protection enforcement. No other circuit court has concluded to the contrary. Accordingly, the Petition for Writ of Certiorari should be denied.

1. The Petition Should Be Denied Because of the Absence of any Ongoing Case or Controversy.

The first obstacle to proper review in this case is that Williams' claim of entitlement to membership on the School District's girls' field hockey team has become moot. The last high school field hockey season in which Williams, a senior, might have participated is over. Williams cannot benefit from the injunctive relief he seeks, and the policy he challenges can never again exclude him from the School District's field hockey team.

Contrary to Williams' argument, the dispute in this case may not properly be described as capable of repetition yet evading review. The issues are not capable of repetition because there can be no reasonable expectation that Williams himself will be subject again to exclusion from the field hockey team pursuant to the School District's policy, and because Williams has never sought to represent a class of similarly situated persons. *See, DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). This conclusion is not altered by Williams' speculative assertion that he may someday be denied membership, due to his gender, on a field hockey team at

an as-yet unknown university. This case concerned the validity of the School District's policy as it applies to high school athletes, and cannot be a proper basis for a purely prospective analysis of other policies and factual contexts.

This case is not of a nature that can be said to evade review, because neither Williams' claim nor the long-standing policy he challenges are so inherently short-lived that full review may never be had. The span of a high school athletic career is at least as long as the three years needed to enter and complete law school, a period not considered to be so short as to prevent review. *DeFunis*, 416 U.S. at 319.

Williams' interest in seeking attorneys' fees does not render dismissal for mootness any less appropriate. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). The School District further submits that Williams should not now be permitted, *after* his claim has expired, to resuscitate this action by promising to later amend his complaint to include a damages claim. Although a properly pleaded claim for damages may avoid mootness, *See, Murphy v. Hunt*, 455 U.S. 478, 482 (1982), the School District is aware of no authority for the proposition that mootness may be reversed by claiming damages after the fact. Williams offers no reason why he did not claim damages under § 1983 at the outset of this action, nor why he has not amended his complaint to claim damages under Title IX since the Third Circuit's decision in December 1990 that such damages were available. *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990).

Lacking any further personal stake in the outcome of this action, Williams essentially invites this Court to provide an advisory opinion speaking to policies and circumstances whose contours may only be surmised. Such an invitation should be refused.

2. The Court of Appeals Correctly Applied the *Sea Clammers* Doctrine to Title IX.

Mootness aside, the review requested by the Petition is not justified by any of the circumstances described in Supreme Court Rule 10.1. There is no conflict between the decision below and the decisions of other courts of appeals, nor is there a present need for this Court to elaborate further on the guidance, correctly applied below, provided in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

Of initial importance is the recognition that the *in terrorem* assertions made in the Petition are rooted in a distorted statement of the relevant inquiry. The primary question presented is not, as Williams contends, whether Congress intended to extinguish the right of individuals to sue to enforce equal protection rights. Correctly viewed, the question is instead whether Congress, in establishing a means of enforcing the Equal Protection Clause applicable to certain educational institutions, intended that the persons benefited thereby should be able to choose to bypass or duplicate such remedies by resort to the catch-all provisions of § 1983.

The Petition further clouds the issue by reference to situations involving institutions to which the prohibitions of Title IX of the Education Amendments of 1972, 20 U.S.

§ 1681 (1988) do not apply by virtue of specific statutory exemption. The question here is not whether Congress, by enacting Title IX and the limitations to its scope, had the intent or power to deny equal protection or a means of enforcing it to those specifically left outside the reach of Title IX. This Court answered that question in the negative in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), also stating that "[i]t is far from clear that Congress intended, through Section 901(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX." 458 U.S. at 732. It is not the issue here, where the focus must be instead upon institutions such as the School District to which Title IX's protections do apply.

The Petition attempts to lead this Court further from the proper focus by mischaracterizing the decision below as one which may mean that "Title IX does not protect John Williams." Petition at 15. In deciding that Williams was not entitled to summary judgment on his Title IX claim under a proper reading of the statute's implementing regulations, the Court of Appeals raised no question as to whether Title IX "protects" Williams from unlawful gender discrimination. Since the School District is unquestionably an institution to which the protections of Title IX apply, Title IX clearly does protect Williams from such discrimination. The question the Court of Appeals remanded for trial is whether Title IX, in prohibiting gender discrimination, necessarily entitled Williams to be allowed to play field hockey under the circumstances of this case. This is a vastly different inquiry.

Once these pitfalls of reasoning are illuminated, it is easier to recognize the soundness of the Court of Appeals' earlier decision in *Pfieffer v. Marion Center Area School District* that resort to § 1983 is not available to a plaintiff whose equal protection interests may be enforced under Title IX. 917 F.2d at 789. It is the *Pfieffer* decision which the Court of Appeals followed in this case, without further analysis. Court of Appeals Opinion, Petition at 39a-42a, 998 F.2d at 176.

As this Court explained in *Smith v. Robinson*, 468 U.S. 992 (1984), § 1983 is a statutory remedy which Congress may replace with an alternative remedy. 468 U.S. at 1012. "The crucial consideration is what Congress intended." *Id.* In determining whether Congress intended to foreclose action under § 1983 when it provides a separate enforcement mechanism for a certain class of persons, it is not necessary that there have been an express statutory provision precluding resort to Section 1983; this intent may also be demonstrated where the alternative remedial scheme is sufficiently comprehensive. *Sea Clammers*, 453 U.S. at 20.

In protesting that this standard cannot be met by Title IX, Williams actually goes so far as to claim that Congress provided no express remedial scheme whatsoever. Petition at 11. The funding cut-off and other express enforcement mechanisms found at 20 U.S.C §§ 1682 and 1683 (1988) amply demonstrate that this is simply untrue. With respect to the absence of express authorization for private causes of action, Williams then fails to recognize that this Court has already answered the crucial question of what Congress *intended* Title IX to provide.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court had little difficulty concluding that "the history of Title IX rather plainly indicates that Congress intended to create such a remedy." 441 U.S. at 694. In reaching this conclusion, the Court gave significant weight to the drafters' view of Title IX as a "strong and comprehensive measure." *Id.* at 704 n. 36 (quoting comments of Senator Bayh, at 118 Cong. Rec. 5806-5807 (1972)), as well as similar "authoritative expressions concerning the scope and purpose of Title IX and its place within the 'civil rights enforcement scheme' . . . ". *Id.* at 687 n. 7.

This Court subsequently clarified just how comprehensive Congress intended the private remedies under Title IX to be, when it explained in *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028 (1992), that Congress intended that a private cause of action for compensatory damages be available under Title IX in addition to actions for injunctive relief. 112 S.Ct. at 1035-36. In so ruling, this Court found itself in agreement with the conclusion on that point reached by the Third Circuit in *Pfeiffer*, 917 F.2d at 787-789. *Franklin*, 112 S.Ct. at 1032.

It is the combined comprehensiveness of the express mechanisms contained in Title IX at 20 U.S.C. §§ 1682 and 1683, coupled with the private causes of action also intended by Congress, which demonstrates that Title IX was intended to supplant rather than supplement remedies under § 1983 with respect to sex discrimination in federally funded educational institutions. Taken as a whole, Title IX is not unlike the statutory and regulatory schemes addressed in *Sea Clammers* and *Smith v. Robinson*.

In one very important sense, remedies under Title IX may be said to be even more complete and effective in accomplishing their goals. In Title IX suits, Congress expressly authorized awards of attorneys' fees to prevailing plaintiffs when it enacted the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988 (1988 & Supp. III 1991), a remedy considered by Title IX's drafters as "essential" to private enforcement. *Cannon*, 441 U.S. 677, 685-687 nn. 6-7. By contrast, the Education of the Handicapped Act, 20 U.S.C. § 1415 (1988 & Supp. III 1991), did not provide for either a damages remedy or awards of attorneys' fees at the time it was examined by this Court in *Smith v. Robinson* and nevertheless found sufficiently comprehensive to preclude resort to § 1983. *Smith v. Robinson*, 468 U.S. at 1020. Similarly, because it provides a compensatory damages remedy, Title IX may also be viewed as a more comprehensive and complete remedy than the citizen suit provisions at issue in *Sea Clammers*, which permitted only prospective injunctive relief. *Sea Clammers*, 453 U.S. at 6; 33 U.S.C. §§ 1365(a), 1415(g) (1988).

Title IX is quite similar in its approach to the enforcement mechanisms established in the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 626 (1988 & Supp. IV 1992), which have been found by the First and Fourth Circuits to be sufficiently comprehensive to preclude resort to remedies under § 1983. *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1366-67 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467 (1st Cir. 1990); *accord, Ring v. Crisp County Hosp. Auth.*, 652 F.Supp. 477 (M.D. Ga. 1987). Once

again, Title IX should actually be viewed as more comprehensive than the remedies provided by the ADEA, under which general compensatory damages are not recoverable. *See, Rogers v. Exxon Research and Eng'g Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

There is no merit in Williams' contention that Title IX and its regulations, as construed by the Court of Appeals in this case, fail to adequately serve equal protection interests. There is no constitutional infirmity in Title IX's recognition that male and female students are not similarly situated when they enter athletic competition. *See, e.g., O'Connor v. Board of Educ. of School Dist. 23*, 449 U.S. 1301, 1307 (Stevens, Circuit Justice 1980) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."). Nor would the Equal Protection Clause invalidate a scheme that refuses to allow males, who have long enjoyed greater athletic emphasis and opportunity, to wield their physiological advantages in programs set aside for the historically disadvantaged sex in order to rectify such inequality.

Permitting girls to voluntarily face the risks and disadvantages of competition on boys' teams is vastly different from allowing boys to join girls' teams in contact sports where such risks and disadvantages would be involuntarily imposed upon other female team members who have nowhere else to compete. Rules that recognize this are more likely to be required by the Equal Protection Clause than condemned by it.

Title IX and its regulatory structure are carefully tailored to address the particular concerns of avoiding and remedying gender discrimination in the context of educational programs. It would make no sense for Congress to have intended that sex-discrimination claims in educational settings could nevertheless be litigated under § 1983 without reference to that context-specific enforcement scheme. If Title IX is not the exclusive remedy for such claims, its mechanisms are rendered superfluous and the detailed guidance it provides to educators is of little practical value.[2] This Court should not accept Williams' invitation to foster such absurdity.

3. The Decision Below is Not in Conflict with Decisions of Other Courts of Appeal.

After acknowledging that no other circuit court of appeals has yet addressed the application of *Sea Clammers* to Title IX, Williams nonetheless posits that a conflict among the circuits exists in this regard. Petition at 20-22. Not even an exceedingly strained reading of the cases

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[2] Williams' argument that a different result is required by this Court's holding in *Franklin v. Gwinnett County Public Schools* misconstrues the plain language and limited extent of that decision. The Court's conclusion therein that "Congress did not intend to limit the remedies available in a suit *brought under Title IX*," 112 S.Ct. at 1036 (emphasis added), reaches no further than the remedial scope of Title IX itself, and implies nothing about what alternative statutory remedies may be combined with a cause of action under Title IX. Only the relief available under Title IX, the sole grounds invoked by the plaintiff for her suit, was at issue in *Franklin*.

Williams cites on this point can provide any basis whatsoever for the remarkable assertion that the circuits involved have "disagreed" with the Third Circuit on this issue.

Rowley v. Board of Education of St. Vrain Valley School District, 863 F.2d 39 (10th Cir. 1988), *vacated as moot and opinion withdrawn*, 863 F.2d at 41, was a challenge brought by a male student to the Colorado High School Activities Association's rules prohibiting boys from competing on girls' volleyball teams. The court of appeals reversed a preliminary injunction granted in favor of the plaintiff, because the district court applied a more stringent equal protection test than was appropriate for a gender-based classification. *Id.* at 40. Although the action was brought under both Title IX and § 1983, the court makes no mention of the *Sea Clammers* doctrine, an issue that was apparently not raised.

The remaining decisions relied on by Williams are similarly devoid of any discussion of the *Sea Clammers* doctrine, and cannot even be described as Title IX cases. In *Habetz v. Louisiana High School Athletic Association*, 915 F.2d 164 (5th Cir. 1990), the court considered a petition for attorney's fees filed by the female plaintiff after the merits of her challenge were rendered moot by the athletic association's amendment to its rule prohibiting girls from playing on boys' sports teams. The action was brought solely under § 1983, and could not have been a "Title IX case", because Habetz brought her challenge before the enactment of the Civil Rights Restoration Act of 1987, P.L. 100-259, 107 Stat. 28 (20 U.S.C. § 1687 (1988)) might have subjected the association to suits under Title IX. In reversing the district court's determination that it

lacked jurisdiction to consider her petition because the association was not a state actor, the Fifth Circuit expressly declined to reach Habetz's contention that the intervening passage of the Civil Rights Restoration Act provided an alternative jurisdictional basis under Title IX for the district court to consider her petition for attorney's fees under 42 U.S.C. § 1988. 915 F.2d at 166. The court of appeals ruled only that Habetz's jurisdictional claims under § 1983 were sufficiently colorable to warrant further determination by the district court of which party, if any, should be considered the prevailing party for § 1988 fee purposes. 915 F.2d at 167.

In *United States v. Massachusetts Maritime Academy*, 762 F.2d 142 (1st Cir. 1985), an action brought by the United States Attorney General under Title IV of the Civil Rights Act of 1964, 42 U.S.C. Section 2000c et seq. (1988), the question was whether the academy's exclusion from the reach of Title IX under the statutory exemption contained at 20 U.S.C. § 1681(a)(4) should also be read into Title IV as a limit on the Attorney General's powers under Title IV. 762 F.2d 142 at 147. There was no issue as to whether the existence of a Title IX remedy foreclosed resort to § 1983, because the institution in question was clearly exempted from the reach of Title IX, and no remedies existed under Title IX for anyone.

In *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759 (2d Cir. 1990) (dismissed on rehearing due to plaintiff's refusal to comply with procedural orders), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1404 (1991), the Second Circuit upheld the district court's dismissal of the female plaintiff's discrimination claims under § 1983 because she could not properly allege any state action. 916 F.2d at 763. The court

nevertheless speculated that the plaintiff might conceivably be able to plead a cause of action under Title IX (although she had not yet attempted to do so) and initially held that she should be afforded the opportunity to amend her complaint accordingly. *Id.* Once again, since the absence of state action prevented resort to § 1983 in the first place, there could be no issue of whether that remedy was foreclosed by the possible existence of a Title IX remedy.

It is clear that the decisions described above do not demonstrate any disagreement with the conclusions of the Third Circuit in this case. It is likewise clear that there is no merit to the Petition's prayer for review on that basis.

CONCLUSION

The comprehensiveness of Title IX's enforcement scheme and the exclusive nature such remedies must enjoy to serve their intended purposes are principles firmly established by the previous teachings of this Court. The decision of the Third Circuit Court of Appeals in this case, thus far unquestioned by any other circuit court of appeals, reflects faithful adherence to that guidance.

In such circumstances, particularly where Petitioners can no longer benefit from the sole relief sought, it is unnecessary and inappropriate for this Court to exercise its powers of review. Accordingly, the School District

respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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